Supreme Court, U. S.
FILED
JUL 27 1977
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States.

OCTOBER TERM, 1977.

No. 77-152

BETH ISRAEL HOSPITAL,

PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD,

RESPONDENT.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Table of Contents.

Opinion below	1
Jurisdiction	2
Applicable statutory provisions	2
Questions presented	2
Statement of the case	2
Reasons for granting the writ	5
Conclusion	17
Appendix A	19
Appendix B	21
Appendix C	49

Table of Authorities Cited.

Cases.

Banker's Club, Inc., 218 NLRB 22, 89 LRRM 1812 (1975)	11-12
Goldblatt Bros., Inc., 77 NLRB No. 24, 22 LRRM 1153 (1948)	11
Guyan Valley Hospital, Inc., 198 NLRB 107, 81 LRRM 1023 (1972)	14
Marriott Corp. (Children's Inn), 223 NLRB No. 141, 92 LRRM 1028 (1976)	11
Marshall Field & Co., 98 NLRB 88 (1952) enf., 200 F. 2d 375 (7th Cir. 1952)	10, 16
May Department Stores Co., 59 NLRB 976 (1944) enf. as modified, 154 F. 2d 533 (8th Cir. 1946) cert. denied, 329 U.S. 725 (1946)	11
NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956)	7

NLRB v. Beth Israel Hospital, 554 F. 2d 477 (1977) 13, 15, 23-47

Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945) 7

St. John's Hospital and School of Nursing, Inc., 222 NLRB No. 182, 91 LRRM 1333 (1976) 4, 5, 6, 9, 10, 15

Seng Co., 210 NLRB No. 129, 86 LRRM 1372 (1974) 8

Stoddard-Quirk, Manufacturing Co., 138 NLRB 615, 51 LRRM 1110 (1962) 8

STATUTES.

28 U.S.C.
§ 1254(j) 2
§ 2112 5

29 U.S.C. § 151 et seq., 61 Stat. 136, 73 Stat. 519, National Labor Relations Act 2, 3, 7, 11

29 U.S.C.
§ 152(2) 9, 19
§ 152(14) 19
§ 157 19-20
§ 158(a)(1) 20
§ 158(a)(3) 20

National Labor Relations Act
§ 7 7
§ 8(a)(1) 3, 4, 7
§ 8(a)(3) 3
§ 8(b)(1) 7

Public Law No. 93-360, 93d Cong. 2d Sess. July 26, 1974 9

MISCELLANEOUS.

Hearings on H.R. 11357 Before a Subcomm. of the House Comm. on Educ. and Labor, 92d Cong., 1st and 2d Sess. (1972) 9

House Report 11357 Before a Subcomm. of the Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess. (1972) 9

Senate Report 93-766 10

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ON APPEAL FROM A JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Beth Israel Hospital prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit.

Opinion Below.

The Opinion of the Circuit Court is reported at 554 F. 2d 477, 95 LRRM 2230. A copy of this opinion is appended hereto. *See* Appendix C *infra*. The Opinion of the National Labor Relations Board is reported at 223

NLRB No. 188 (1976). A copy of this opinion is appended hereto. *See* Appendix B *infra.*

Jurisdiction.

The judgment of the Court of Appeals for the First Circuit was entered on April 29, 1977. The jurisdiction of the Court is invoked under 28 *U.S.C.* § 1254(1).

Applicable Statutory Provisions.

The relevant provisions of the *National Labor Relations Act,* as amended (61 Stat. 136, 73 Stat. 519, 29 *U.S.C.* § 151 *et seq.*) are set forth in Appendix A *infra.*

Questions Presented.

I. Whether the National Labor Relations Board can continue to adhere to a policy regarding solicitation and distribution in a hospital setting which unduly ignores the rights and well-being of hospital patients.

II. Whether a hospital can be held to have committed unfair labor practices by having enforced a rule promulgated in recognition of its responsibility to its patients.

Statement of the Case.

Beth Israel Hospital (hereinafter referred to as the "Petitioner" or the "Hospital") is a nonproprietary hospital located at 330 Brookline Avenue, Boston, Massachusetts. It is an employer within the meaning of the *National Labor Relations Act* (hereinafter referred to as the "Act"). The Petitioner employs approximately 2,200 employees excluding house staff, attending physicians, students and Harvard employees who work on the premises.

On October 29, 1974, an unfair labor practice charge was filed against Petitioner by Massachusetts Hospital Workers Union, Local 880, Service Employees International Union, AFL-CIO (hereinafter referred to as the "Union"), a labor organization within the meaning of the Act.

In substance the complaint, dated February 21, 1975, charged the Hospital with violating Section 8(a)(1) of the Act by initiating, promulgating and maintaining a written rule prohibiting distribution of union literature and solicitation except on a "one-to-one" basis in the facility's cafeteria and coffee shop; and Sections 8(a)(1) and 8(a)(3) by issuing oral and written warnings to Ann Schunior, an employee, threatening her with dismissal if she continued to distribute literature in the cafeteria of the Hospital. The Petitioner denied that it had engaged in conduct violative of the Act. Subsequently, the Hospital modified its rules to prohibit one-to-one solicitation in the cafeteria and coffee shop, "with the hope and expectation that the Board for the first time would delineate legal parameters for valid no solicitation and no distribution rules in public areas of nonproprietary hospitals" (Brief in Support of Exceptions filed by Petitioner, p. 19). On April 9, 1975, the complaint was amended charging the Hospital with violating Section 8 (a)(1) of the Act by initiating, promulgating and maintaining a written rule prohibiting solicitation in the facility's cafeteria and coffee shop, an allegation similarly denied by Petitioner in its amended answer.

The no-distribution, no-solicitation rules in effect at the date of the hearing before the Administrative Law Judge are set forth below:

> There is to be no soliciting of the general public (patients, visitors) on Hospital property. Soliciting

and the distribution of literature to Beth Israel employees may be done by other Beth Israel employees when neither individual is on his or her working time, in employee-only areas — employee locker rooms and certain adjacent rest rooms. Elsewhere within the Hospital, including patient-care and all other work areas open to the public such as the lobbies, cafeteria and coffee shop, corridors, elevators, gift shop, etc., there is to be no solicitation nor distribution of literature.

Solicitation or distribution of literature on Hospital property by *non-employees* is expressly prohibited at all times.

Consistent with our long-standing practices, the annual appeal campaigns of the United Fund and of the Combined Jewish Philanthropies for voluntary charitable gifts will continue to be carried out by the Hospital.

A hearing was held before Administrative Law Judge, Ivar H. Peterson, who ruled that the Hospital had committed the alleged unfair labor practices, and the Hospital seasonably filed exceptions to his decision. The Board affirmed the rulings, findings, and conclusions of the Administrative Law Judge. Decision reported at 223 NLRB No. 188, 92 LRRM 1078 (1976). The Board found that Petitioner had committed an additional Section 8 (a)(1) violation by maintaining an overly broad no-solicitation, no-distribution rule prohibiting all solicitation and distribution in all areas to which patients, employees and visitors have access during non-working time other than *immediate patient care areas.* The Board cited *St. John's Hospital and School of Nursing, Inc.*, 222 NLRB No. 182, 91 LRRM 1333 (1976), decided subsequent to the Administrative Law Judge's decision in the case at bar,

as authority for this conclusion. Except for a technical modification, the Board adopted the Administrative Law Judge's recommended Order in its entirety.

Upon the Board's petition for enforcement, the United States Court of Appeals for the First Circuit under the authority of Section 2112 of Title 28 of the United States Code enforced the Board's order. *NLRB v. Beth Israel Hospital,* 554 F. 2d 477.

Reasons for Granting the Writ.

I. A conflict exists between the rule followed by the United States Court of Appeals for the Tenth Circuit and that applied by the First Circuit in this case. This Court should exercise its supervisory powers to resolve this conflict.

On July 14, 1977, the United States Court of Appeals for the Tenth Circuit, in an as yet unreported decision, denied enforcement in pertinent part of the Board's order rendered in *St. John's Hospital & School of Nursing, Inc.,* 222 NLRB No. 182, 91 LRRM 1333 (1976), *enf. denied* in part and granted in part, Dkt. No. 76-1130 (10th Cir. July 14, 1977). In that case the Board had established that rules barring solicitation in areas of a hospital other than immediate patient care areas are presumptively invalid. It was the *St. John's* rule which formed the basis for the Board's order against Petitioner herein, and the First Circuit relied upon the *St. John's* doctrine in enforcing that order.

The Tenth Circuit denied enforcement of the Board's order insofar as it would permit solicitation and distribution in patient access areas. In *Beth Israel* arguments were made before the Court as to the detrimental effects of solicitation and distribution on patients and visitors constituting a special circumstance sufficient to rebut the presumption of invalidity of the rule banning solicitation

and distribution in patient access areas of the Hospital, specifically its cafeteria and coffee shop. The First Circuit agreed with the Board that Beth Israel had not met its burden of proof in this regard. In *St. John's* the Board conceded these detrimental effects and held that, "[t]his recognition of the unsettling effects of solicitation on patients must be viewed as establishing a 'special circumstance, making at least some restrictions on solicitation necessary to maintain efficient and orderly operations. Once this special circumstance is established, even under the Board's rationale, the presumption of illegality, is rebutted . . . ." *St. John's* at 12. The Tenth Circuit further held that: "[o]nce it is admitted that union solicitation is disruptive of the tranquil atmosphere essential to the Hospital's primary function of providing quality patient care and may be unsettling to patients who are seriously ill and thus in need of quiet and piece of mind, it is unreasonable to conclude that these adverse effects of union solicitation will occur in some patient access areas but not in others. As demonstrated above such a distinction is totally unsupported by the record evidence and involves medical and administrative judgments outside the Board's acknowledged area of expertise. *St. John's* at 11.

With the decision of the Tenth Circuit, a direct conflict has arisen between that decision and the First Circuit decision in the case at bar. This Court has traditionally exercised its discretionary jurisdiction to resolve such direct conflicts between inferior tribunals, and should certainly do so here to resolve the uncertainty regarding this important aspect of labor relations law.

II. The First Circuit in giving force and effect to a policy of the Board which impairs the ability of hospitals to provide complete medical care and which infringes on the rights of innocent third parties has decided an important question of federal law which has not been, but should be, settled by this Court. The issue is of utmost importance in the administration of the National Labor Relations Act.

The decision of the First Circuit in this case brings to the attention of this Court the need for exercise of its supervisory powers to decide a matter of substantial importance to the public. It is left to this Court to formulate guidelines to govern the question of solicitation and distribution of union literature in a hospital and its environs so as to insure that the rights of innocent third parties, hospital patients and their visitors, are no longer ignored as they have been by the Board. There is no need to recite the many serious problems involved in the health care system in the United States at this time. Suffice it to say that the policy of the Board in formulating solicitation and distribution rules which focus solely on the needs of employer and employees, giving little heed to the rights of sick persons to quality health care, provided in accordance with sound medical judgment, merely exacerbates the frustration of the public in its quest for competent and affordable health care.

Section 7 of the Act grants employees a twofold statutory right, the right to engage in or refrain from self-organization. This two-edged guarantee is protected by Sections 8(a)(1) and 8(b)(1) of the Act. In addition to employee rights, the Act recognizes the right of an employer to control the use of its property to maintain order and discipline in its business establishment. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). The Board and the courts attempt to maintain an accommodation between employee-employer rights with as little "destruction of one as is consistent with the maintenance of the other." *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956).

In determining the accommodation required to be made by the Board and the courts between employee and employer rights, it is imperative to recognize that the rights of a third party, namely, the patient, must be taken into consideration. Every new employee at Beth Israel Hospital is given a copy of the pamphlet, "Your Rights as a Patient at Beth Israel Hospital." Additionally employees are made aware of such a publication in employee meetings and in the employee newsletter. The widespread dissemination of the "Patients Rights" pamphlet and the explanation of the contents therein to employees demonstrates that patients too have rights which must be taken into account in the weighing process.

The Board has developed rules as basic postulates to be applied in testing the propriety of no-solicitation, no-distribution rules. Employees may be prohibited from soliciting during working time and from distributing literature in working areas during working and non-working time. *Seng Co.*, 210 NLRB No. 129, at 936, 86 LRRM 1372 (1974). A rule forbidding distribution by employees in non-working areas during non-working time is presumptively invalid, and a rule prohibiting union solicitation by employees during non-working hours is presumptively invalid, even if limited to working areas. *Stoddard-Quirk, Manufacturing Co.*, 138 NLRB 615, 51 LRRM 1110 (1962). A presumptively invalid rule may become proper if the employer can demonstrate "special circumstances" to justify its promulgation and enforcement.

In the present case, the Board refused to consider as a special circumstance the fact that patients frequenting the cafeteria and coffee shop could be disturbed by union solicitation and distribution activity thereby justifying the promulgation and enforcement of Petitioner's rules banning such activity in those areas. The Board found that Petitioner failed to meet its burden of establishing the

existence of special circumstances sufficient to rebut the presumptive invalidity of its rule as applied to the cafeteria and coffee shop. The decision, in the case at bar, enforced by the First Circuit, not only flies in the face of good common sense, but also is at odds with the Board's own position in *St. John's* where it concedes the detrimental effects of solicitation and distribution on patients. *St. John's* at 14, n.7. The decision in *Beth Israel* represents an abandonment of the responsibilities conferred upon the Board by Congress when it extended the coverage of the Act to employees of all health care institutions in 1974. Pub. L. No. 93-360, 93d Cong. 2d Sess. (July 26, 1974), 29 *U.S.C.* § 152(2) and (14). Congress, in enacting the 1974 Health Care Amendments, acted not only in recognition of the interests of hospital employees, but it is clear that Congress was also concerned with a patient's well-being in a health care institution, a fact made plain by examination of the relevant legislative history. *See, e.g.*, Legislative History of the Coverage of Nonprofit Hospitals Under the National Labor Relations Act, 1974 (hereafter "Legislative History"), Pub. L. No. 93-360 (S. 3203), prepared by the Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate pp. 10, 13. *See generally,* Hearings on H.R. 11357 Before a Subcomm. of the Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess. (1972); Hearings on H.R. 11357 Before a Subcomm. of the House Comm. on Educ. and Labor, 92d Cong., 1st and 2d Sess. (1972).

The following comments in the legislative history of Public Law 93-360 confirm this analysis of Congressional concern:

> "In the Committee's deliberation of this measure it was recognized that the needs of patients in health care institutions required special consideration in the

> Act. . . ." Senate Report 93-766, Legislative History, p. 11.
>
> "Many of the witnesses before the Committee, including both the employee and the employer witnesses, stressed the uniqueness of health care institutions. There was a recognized concern for the need to avoid disruption of patient care whenever possible." Senate Report 93-766, Legislative History, p. 13.

Congress allowed for organization and representation of health care employees only upon the expectation that the Board would take care to safeguard the rights and interests of patients. It is clear from the decisions of the Board in *St. John's Hospital & School of Nursing, Inc., supra,* and in other cases such as this one, decided in accord with *St. John's,* that that expectation was unjustified. The Board has abdicated its position as protector of the innocent third party. By limiting the scope of rules barring solicitation to immediate patient care areas only, the Board has exhibited its lack of sensitivity to the special concerns involved in providing medical treatment. Rather than give special attention to the rights of hospital patients, the Board has refused to accord them even the same rights as have been given to customers in a department store or to patrons in a restaurant.

In department stores and similar retail businesses it has been held that solicitation in the store's public areas, such as selling floors, elevators, corridors, and public restaurants, where employees and customers interact, may be forbidden at all times. *Marshall Field & Co.*, 98 NLRB 88 (1952), *enf.*, 200 F. 2d 375 (7th Cir. 1952). The reason for the exception to the general rule is that solicitation "where customers are normally present *might conceivably* be disruptive of the respondent's business" (emphasis added). *May Department Stores Co.*, 59 NLRB 976 (1944), *enf. as mod.*, 154 F. 2d 533 (8th Cir. 1946), *cert. denied,* 329 U.S. 725 (1946).

In a restaurant setting the Board has held that a no-solicitation rule enforced by an employer on a public restaurant's premises did not violate the Act "since under the circumstances union solicitation in the restaurant *is as apt* to disrupt the employer's business as is such solicitation carried on in any other part of the store in which customers are present" (emphasis added). *Goldblatt Bros., Inc.*, 77 NLRB No. 24, at 1262, 22 LRRM 1153 (1948). A ban on solicitation limited to *public* areas of a restaurant, such as customer or sales areas, during working or non-working time is valid (emphasis added). *See Marriott Corp. (Children's Inn)*, 223 NLRB No. 141, 92 LRRM 1028 (1976).

Another decision of the Board involving a restaurant situation, *Bankers Club, Inc.*, 218 NLRB 22, 89 LRRM 1812 (1975), amply illustrates the approach adopted by the Board when the third parties involved are diners. In an opinion approved by the Board, the Administrative Law Judge stated:

> The Board has long approved employer rules prohibiting all solicitation, even during employees' non-working time, in the selling areas of stores and other establishments, such as restaurants, on the theory that such activity might *tend* to drive away customers.
>
> • • •
>
> In the cases of restaurants or other establishments where customers are present it is their presence and the *likelihood* of their being exposed to union activities that creates the "special circumstances" that justify infringing on employees' basic rights.

Id. at 27 (emphasis added). In regard to distribution, the same considerations held sway:

> [L]iterature in the customer area not only might create a litter problem, but might also antagonize customers who find and read a discarded copy. Whatever short-or-long run ill effects on customer appetite or patronage might flow from a flyer advocating a boycott of lettuce or grapes, not to mention one attacking Respondent's labor policies — with or without recommendations — I cannot say, but *Respondent should not have to bear the risk* of any when there are other areas for distribution in the restaurant. I find that the no-distribution portion of the rule is not overly broad and illegal.

Id. at 27 (emphasis added).

A policy which permits no-solicitation rules where the activity *might* upset retail customers or restaurant patrons but which prohibits such rules unless a harmful effect upon sick persons is actually shown hardly reflects a recognition by the Board of the concerns expressed by Congress in permitting the Board to assume jurisdiction over hospital employees.

More restrictive no-solicitation, no-distribution rules are necessary in a hospital cafeteria and coffee shop in order to avoid the disturbance of the hospital's relationship with its patients in the course of providing health care. The Hospital contends that the retail store analogy is applicable in that solicitation and distribution of literature in the cafeteria and coffee shop might undermine the tranquil atmosphere required in a hospital setting. Certainly, if a customer in a store who is intent on buying merchandise is shielded from disruption of this sort, given the nature of a patient care establishment, there are more compelling reasons why patients and their visitors should be similarly protected. Customers in a retail store or restaurant who are distracted by solicitation or distribution activities are free to leave the premises never to return again. The customer need endure only a few moments of discomfort. In contrast, the patient in a health care facility, at a minimum, usually remains for several days of treatment. Solicitation and distribution activities could thereby upset patients and their visitors for extended periods of time. Furthermore, unsubstantiated or unwarranted statements conveyed in this manner could readily abuse the trust which patients and visitors place in the Hospital. Once a patient has been admitted to a hospital or nursing home, it is unlikely, given his state or health, that he would leave the facility and seek health care elsewhere.

In enforcing the Board's order, the First Circuit expressed the following view:

> This is not to say that the Board does not bear a heavy continuing responsibility to review its policies concerning organizational activities in various parts of hospitals. Hospitals carry on a public function of the utmost seriousness and importance. They give rise to unique considerations that do not apply in the industrial settings with which the Board is more familiar. The Board should stand ready to revise its rulings if future experience demonstrates that the well-being of patients is in fact jeopardized.

NLRB v. Beth Israel Hospital, 554 F. 2d 477 at 481. This method of proceeding may eventually result in the Board's discovering the rule which will properly reflect its duty under the Act, but only at the incalculable cost of actual accomplished harm to a suffering patient. It is the duty of this Court to prevent such experimentation with the

health and well-being of patients which may be jeopardized by union solicitation.

The Board's abandonment of the rule endorsed in *Guyan Valley Hospital, Inc.*, 198 NLRB 107, 81 LRRM 1023 (1972), which recognized a *tendency* to disturb patients as justifying a no-solicitation rule in hospitals is indicative of its lack of expertise in this area. Even more indicative of the Board's inability to formulate rules for application in the area of medical care is its insistence that solicitation for a benevolent organization, such as the United Fund, could be equated to the Union's scurrilous propaganda, asserting that the quality of care at the Hospital is substandard. Moreover, the Board's decision regarding the impact of disturbing activity on "ambulatory" patients is, in light of the total lack of medical corroboration for such a theory and, as in *St. John's,* the absence of any record evidence to support a distinction between the sensibilities of bedridden vis-a-vis ambulatory patients, highly presumptuous. In fact, the lack of expertise of the Board makes somewhat frightening the fact that that body is rendering decisions on matters which have a direct bearing on hospital patients' opportunities for recovery. For example, it is certainly speculative to state that ambulatory patients well enough to frequent public areas of the hospital are "highly unlikely" to be harmed "if they happen to read" "As We See It"; or that, "[p]atients not well enough to be subjected to outside contacts normally stay in their rooms or other immediate patient care areas and will not be exposed to this literature." Visitors and patients exposed to union literature attacking the quality of patient care provided by the Hospital and applauding work stoppages may well become anxious and apprehensive.

In light of the fact that psychiatric outpatients frequent the cafeteria, dressed in street clothes, the Board's

distinction between ambulatory and non-ambulatory patients as a basis for the "immediate patient care area" formula merely serves as an indication that the Board lacks expertise in regard to the operation of health care institutions. In *St. John's* the court found it unreasonable to conclude that the adverse effects of union solicitation will occur in some patient access areas but not in others and that such a distinction involves medical and administrative judgments outside the Board's acknowledged area of expertise. *St. John's* at 11. The decision of the First Circuit approving the Board's policy may be categorized as reluctant at best. That court, operating under the severe constraints of its limited powers of judicial review, noted the need for this Court to provide guidance to the courts below who are, and will be, deciding a large number of similar cases, when it said:

> A non-profit hospital's concern about the possible effect on patients or organizational conduct in parts of the institution can hardly be dismissed as unreasonable when registered at a time when guidelines are still in flux and are in the process of being formulated through administrative and court proceedings.

NLRB v. Beth Israel Hospital, 554 F. 2d 477 at 483.

It is the responsibility of this Court to direct the Board toward implementation of a policy which gives some measure of attention to the rights of patients to beneficial health care. Integral to that policy must be a recognition of the fact that it is the Hospital which possesses the medical expertise required to determine what rules are necessary to preserve the medical well-being of persons under its care. It is the Hospital that has a duty to provide proper health care to its patients. This obligation entails a technical curing function and a human

caring function twenty-four hours a day. The duty of patient care does not terminate once the patient enters the cafeteria or coffee shop, but rather, it is a twenty-four hour a day operation. The primary concern of the Hospital is the care of its patients and under no circumstances may patient care be compromised. The no-solicitation and no-distribution rules are directed to that end. The patient and public areas of the Hospital are all areas used as a part of the service that the Hospital provides for its customers, patients and their visitors. Like the selling *or public areas* of a retail store, the patient and public areas of the Hospital should not "be converted into an arena for the organization of employees" *Marshall Field, supra* at 378.

It is the Hospital that has a duty to provide the therapeutic milieu required to effectuate recovery of its patients. It is the Hospital, not the Union or the Board, that is held answerable, morally and legally, when something goes wrong with the curative and recovery process. And it is the Hospital that possesses the knowledge necessary to perform that function. Promulgation by the Hospital of the rules regarding solicitation and distribution was undertaken in the interest of securing proper recuperative environment for its patients, not out of self-serving anti-Union motivations. This is clearly illustrated by the fact that Petitioner has freely granted access to several adequate and effective areas for solicitation and distribution.

This Court should, therefore, seize upon this opportunity to provide guidelines to the Board and courts which will re-establish that the hospital setting presents a situation where there exists third party rights which must be recognized and accommodated.

Conclusion.

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Appendix A.

Relevant Statutes.

United States Code, Title 29:

§ 152 — Definitions.

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

• • •

(14) The term "health care institution" shall include any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm, or aged person.

§ 157 — Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or

all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

§ 158 — Unfair Labor Practices.

(a) It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

• • •

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . .

Appendix B.

223 NLRB No. 188

MFJ
D—1048
Boston, Mass.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD

Case 1—CA—10200

BETH ISRAEL HOSPITAL
and
MASSACHUSETTS HOSPITAL WORKERS UNION,
LOCAL 880, SERVICE EMPLOYEES
INTERNATIONAL UNION, AFL-CIO

DECISION AND ORDER

On July 25, 1975, Administrative Law Judge Ivar H. Peterson issued the attached Decision in this proceeding. Thereafter, counsel for Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions [2] of the

[1] In sec. II, D, *Discussion and Conclusions*, of the attached Decision, the Administrative Law Judge erred in stating that in *Summit Nursing and Convalescent Home, Inc.*, 196 NLRB 769 (1972), the Board found lawful a rule which prohibited union solicitation on company property even though it was on employees' nonworking time and in nonworking areas. This was the Administrative Law Judge's recommendation, and the Board reversed him.

[2] Subsequent to the Administrative Law Judge's Decision in this case, the Board in *St. John's Hospital and School of Nursing,*

Administrative Law Judge and to adopt his recommended Order as modified herein.

D—1048

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge as modified below and hereby orders that Respondent, Beth Israel Hospital, Boston, Massachusetts, its officers, agents, successors, and asigns, shall take the action set forth in the said recommended Order, as so modified.

1. In paragraph 1(a) substitute "in any other manner" for "in any like or related manner."

2. Substitute the following for paragraph 2(d):

"(d) Notify the Regional Director for Region 1, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith."

Dated, Washington, D.C. Apr. 30, 1976.

NATIONAL LABOR RELATIONS BOARD
Betty Southard Murphy, Chairman
John H. Fanning, Member
Howard Jenkins, Jr., Member

(SEAL)

Inc., 222 NLRB No. 182 (1976), held that restrictions on solicitation and distribution in patient access areas such as cafeterias violates Sec. 8(a)(1) of the Act. Accordingly, the Respondent also violated Sec. 8(a)(1) by maintaining an overly broad no-solicitation, no-distribution rule that prohibited all solicitation and distribution in all areas to which patients and visitors have access and employees have access during nonworking time other than immediate patient care areas.

JD-414-75
Boston, Mass.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D. C.

Case No. 1-CA-10200

BETH ISRAEL HOSPITAL, ET AL.
and
MASSACHUSETTS HOSPITAL WORKERS UNION, LOCAL 880, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO

Jeanne Baum, Esq., and *Arnold M. Marrow, Esq.*, of Boston, Mass., for the General Counsel.

Jonathan Hiatt, Esq., of Boston, Mass., for the Union.

Robert Chandler, Esq., and *Vernon C. Stoneman, Esq.*, of Boston, Mass., for the Respondent.

DECISION

Statement of the Case

IVAR H. PETERSON, Administrative Law Judge: This case was tried before me in Boston, Massachusetts, on April 24 and 25 based upon the complaint issued by the Regional Director for Region 1 on February 21, later amended, and the answer of Beth Israel Hospital, herein

called the Respondent or the Hospital, dated February 26. The complaint was based upon the charges filed by Massachusetts Hospital Workers' Union, Local 880, Service Employees' International Union, AFL-CIO, herein called the Union, dated October 29, 1974. In its answer, the Respondent admitted certain jurisdictional allegations but denied that it had engaged in any conduct violative of the Act. Briefly stated, the complaint alleged that the Respondent had engaged in conduct violative of Section 8(a)(1) and (3) of the Act, by initiating, promulgating, and maintaining a written rule prohibiting (a) distribution of union literature in the cafeteria and coffee shop of the hospital, and (b) solicitation except on a "one-to-one" basis in the cafeteria and coffee shop. In addition, the complaint alleged that on or about October 25, by its agents, Dr. Mitchell T. Rabkin and Dr. Stephen Robinson, the Respondent issued oral and written warnings to an employee, Ann Schunior, threatening her with dismissal if she continued to distribute literature in the hospital's cafeteria. These warnings, according to the complaint, included an oral warning by Dr. Rabkin on October 25, and a written warning dated the same date, and signed on October 28, by Dr. Rabkin and Dr. Robinson, which threatened Schunior with discharge because she joined or assisted the Union or engaged in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. These acts, it is alleged, as carried out by the Respondent, discriminated with regard to the hire or tenure or terms or conditions of employment of Schunior, thereby discouraging membership in the Union and constituting unfair labor practices within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act. In its answer, as subsequently amended, the Respondent admitted certain jurisdictional allegations but denied that it had engaged in any unfair labor practices.

Upon the entire record in the case,[1] including my observation of the witnesses as they testified, and careful consideration of the briefs filed with me on or about June 10, I make the following:

Findings of Fact

I. Jurisdiction

The Respondent, a Massachusetts corporation, is a nonproprietary hospital in Boston and employs approximately 2200 employees excluding house staff, attending physicians, students, and employees of Harvard University, who work on the premises. It is admitted, and I find, that the Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act. It is further admitted, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

A. *Preliminary Statement*

Only five witnesses were called in this proceeding. All of them, except Schunior, the alleged discriminatee, and the Director of Personnel Services, Anne Cronin, testified for relatively short periods. The parties cooperated in formulating a substantial number of stipulations which, together with attached material, were introduced into evidence as joint exhibits, thereby facilitating and shortening the hearing considerably.

In May 1970 the Respondent issued a handbook to employees, which was revised in subsequent years, entitled "Working Together." This booklet contained information concerning the hospital and its buildings, information regarding job qualifications, working hours and paydays, and

[1] The unopposed motion of counsel for the General Counsel to correct the transcript of record is hereby granted.

unemployment compensation; it outlined details with respect to salaries, overtime, merit increases, promotions and transfers; in addition, it set forth health and other benefits available to employees, such as vacations, holidays, sick leave, retirement plan, accident insurance, payroll savings plan, lunch and relief periods, parking facilities, and information concerning the cafeteria and coffee shop. It also contained hospital rules and the responsibilities of employees to the hospital with respect to appearance and conduct, confidential information, attendance and punctuality, and the like. A violation of a rule could either result in immediate dismissal or, depending upon the nature of the violation, be considered good and sufficient cause for dismissal. The handbook further stated that it was the general policy of the hospital to give warning prior to dismissal. The rules with which we are here primarily concerned are as follows: (a) Rule 12, which forbade the "collecting money or soliciting for any purpose on Hospital work time without prior official approval of a Division Director"; (b) Rule 13, which forbade "posting notices or distributing literature on Hospital property without prior authorization of a Division Director"; and (c) Rule 17, which forbade "loitering on the premises before and after working hours." On July 23, 1970, Dr. Rabkin issued a newsletter to employees which, among other things, provided that "petitions, discussions, etc., amongst Hospital personnel should be carried out only on a person to person basis at coffee breaks, mealtimes or after the working hours of all those involved." The statement went on to provide that it "should not be interpreted as forbidding ordinary conversations, discussions, etc., which do not interfere with work or the rights of others. Direct confrontation and solicitation of the public, staff and employees through leaflets, etc., must not be done on Hospital property."

According to a decision of the Massachusetts Labor Relations Commission, which was issued October 5, 1973, and will be referred to subsequently, this clarification or modification was necessary "because of anti-war and related protests at that point in time 'which could have caused disruption and upset patients.' " The same newsletter went on to state that "our experience has shown that many patients do become upset when those caring for them display political emblems. Consideration of patients, therefore, indicates that armbands, pins, etc., should not be displayed on patient units." In a newsletter dated March 22, 1973, Dr. Rabkin issued "a simplified restatement of Hospital rules with reference to employees' activities on Hospital premises," which provided that, among other things, "With the exception of the United Fund and Combined Jewish Philanthropies drives, no one may hand out literature or solicit any employee, staff member or member of the public for any purpose on Hospital work time, nor may they do so in patient, visitor or other public areas"; and that employees "are not to loiter on the Hospital premises before or after working hours." According to the newsletter, this "clarification of existing rules is necessary because of the activities of a very few employees who apparently have not been aware of Hospital policy."

B. *Interference, Restraint and Coercion*

On March 26, 1973, an unfair labor practice charge was filed by the Union with the Massachusetts Labor Relations Commission, and, following the October 5 decision and order handed down by the Commission, a special newsletter was issued by Dr. Rabkin, on October 18, containing the following new rules: (a) "Employees may distribute organizational literature during non-working hours, such as lunch periods or coffee breaks, in areas which are only for

employees, such as locker rooms and employee lounges"; (b) in conformance with past policy, "employees may continue to discuss any matter, including unions, during specified non-work times and may engage in such discussions with fellow employees also not at work to enlist support of their particular views in employee-only areas or in areas where patients, visitors and employees not on duty are permitted to congregate and intermingle, such as the cafeteria and coffee shop"; and finally, the Hospital reaffirmed its position "that our employees have the right to engage in or refrain from organizational activities as they see fit within the general Hospital guidelines, and we reemphasize once again that the Hospital will not interfere in any way with the employees' self-organizational rights."

Under date of May 6, 1974, the Boston Hospital Workers Organizing Committee, Service Employees International Union, AFL-CIO, filed another unfair labor practice charge before the Massachusetts Commission, in which it was alleged that some employees were threatened with arrest for distributing union literature in locker rooms. On September 11, a settlement agreement was signed, which, among other things, provided that the hospital would not interfere with the right of employees "to distribute union organizational literature in employee-only areas," or prevent the distribution of union literature "by employees during non-working time in employee-only areas of the hospital" or threaten "to arrest employees who persist in their attempts to distribute union literature on non-working time in employee-only areas of the hospital" or otherwise discipline them for so doing. In a newsletter dated September 19, Dr. Rabkin admitted that on at least one occasion a security guard did violate the hospital's rules in a situation where literature distribution was permitted and, in consequence, the Respondent undertook to reinstruct all of the guards. In

newsletters issued early in July, Dr. Rabkin set forth the solicitation rule which continued in effect until the issuance of the complaint in this proceeding. It provided as follows:

> Hospital employees who want to solicit other employees for the Union or other causes may do so when they are not on their own working times, but only in two well-defined locations of the Hospital:
>
> 1) Employee-only areas — employee locker rooms and certain adjacent rest rooms; and
>
> 2) Cafeteria and coffee shop.
>
> In the locker areas literature may be offered. In the cafeteria and coffee shop, conversations may take place on a one-to-one basis but there is to be no setting up of special tables, public distribution of literature nor any form of coercion. Elsewhere within the Hospital, including patient-care and other work areas, the lobbies, corridors, elevators, libraries, meeting rooms, etc., there is to be no solicitation nor distribution of literature. Soliciting of patients and visitors is expressly prohibited at all times and places.

On October 25, Schunior, the alleged discriminatee, distributed the union newsletter, "As We See It," while on her lunch hour in the cafeteria. Dr. Rabkin gave her a verbal warning and subsequently a final written warning. It recited that he had observed Schunior "carrying a pile of 'As We See It'" and "walking around from one table to the next offering the newsletter to people sitting at luncheon" and that she "was not engaging in specific one-to-one conversation with any particular individual and then handing over a copy of the newsletter" but, instead, "was table-hopping and offering the newsletter generally to anyone in her immediate vicinity." According to Dr.

Rabkin, Schunior, in response to his statement that she was violating hospital regulations, replied with the inquiry whether he was aware of the fact that NLRB regulations "were different from those of the Massachusetts Labor Relations Commission and that what she was doing was consistent" with Board regulations. An unfair labor practice charge was filed by the Union with the Board, in view of the fact that the Board had recently asserted jurisdiction. Under date of March 5, 1975, the solicitation rule was changed to provide as follows:

> There is to be no soliciting of the general public (patients, visitors) on Hospital property. Soliciting and the distribution of literature to BI employees may be done by other BI employees, when neither individual is on his or her working time, in employee-only areas — employee locker rooms and certain adjacent rest rooms. Elsewhere within the Hospital, including patient-care and all other work areas, and areas open to the public such as the lobbies, cafeteria and coffee shop, corridors, elevators, gift shop, etc., there is to be no solicitation nor distribution of literature.
>
> Solicitation or distribution of literature on Hospital property by *non-employees* is expressly prohibited at all times.
>
> Consistent with long-standing practices, the annual appeal campaigns of the United Fund and of the Combined Jewish Philanthropies for voluntary charitable gifts will continue to be carried out by the Hospital.

C. *The Discipline of Schunior*

Schunior, a research technician in the Department of Medicine, had worked at the hospital a little over a year. On her lunch hour on October 25 she distributed union literature. She testified that prior to the election in April,

she had never been in the locker room area but since then she had been in there probably once a week or once every 2 weeks because, as she testified, that was "the only place we can legally distribute *As We See It,* and talk to employees about the Union, and that is what I do there." She testified that she had been in two women's locker rooms and that she had seen nothing posted on the bulletin board in either locker room. Schunior eats lunch in the cafeteria 3 or 4 days a week and, in addition, has coffee there one or two mornings a week before going to work. In the course of her duties she goes through the cafeteria as often as a dozen times a day. She testified that there were many differences between employees and non-employees, and mentioned that many of the employees wear uniforms and most wear name tags. In addition, she added that after working a period, one begins to recognize faces of people one sees daily. On the other hand, visitors do not wear name tags or uniforms and they generally appear unfamiliar with things associated with the cafeteria line. With respect to patients, which are of two kinds, in-patients and out-patients, the former, so she stated, "generally look like patients" and, on occasion, they come into the cafeteria in bedclothes and wear wrist bands. On the other hand, she stated that there was generally no way of distinguishing out-patients from visitors.

On the day that she distributed literature she was in the cafeteria going from table to table handing out the pamphlets. She stated that as a general rule she asked people that she thought were employees if they would like a copy of "As We See It," the union pamphlet. If she thought that the individuals might be visitors, she first asked if they were employees and explained that she was passing out literature for employees. Schunior testified that there was a table in front of the non-official bulletin board which had

been there since she began working, and that on one occasion she saw someone, whom she thought to be an employee, place some literature on the table. As she recalled, this was either at lunch time or perhaps at breakfast time. She observed employees take the literature that had been placed on the table.

The Respondent distributes its newsletter, as well as other literature on occasion, with employee paychecks. Robert Hess, a respiratory therapist who had worked at the hospital over 6 years, testified that travel advertisements were occasionally included with the paychecks and that he "found it somewhat irritating to get a paycheck . . . and then get travel ads for more than the paycheck totaled. In one case there were six of them distributed with the paycheck." Cronin testified that she eats in the cafeteria about 20 percent of the time and that on occasion she is able to distinguish employees from non-employees, but she said that as to a large number she cannot distinguish whether they are Beth Israel employees or employees from other hospitals, students or volunteers. With respect to whether all employees wear hospital name tags, Cronin stated that a large number of employees on occasion forget to wear the tags which, according to her, "is a constant source of concern of many of our department heads, who certainly urge it."

As stated above, Dr. Rabkin orally warned Schunior on October 25, the day she distributed the union pamphlet during her lunch hour, and subsequently she was given a final written warning, which stated that she "continued to violate" the rule "despite several verbal warnings" that she was "in flagrant violation of such rule and admission on your part of your knowledge of the existence of such rule." The notice stated that further violation would result in dismissal.

D. *Discussion and Conclusions*

The record shows that solicitation and distribution rules affecting the cafeteria have been relaxed in certain situations. Thus, during March posters publicizing the hospital's "buck a day" program, a cost reduction effort, were displayed in the cafeteria. A travel brochure rack is situated adjacent to the non-official bulletin board, a car pool board is posted in the same area, and during National Nutrition Week a table was set up in the cafeteria on which was placed literature concerning nutritional ideas for the information of employees, patients and visitors. Moreover, from time to time certain commercial literature has appered on a table underneath the non-official bulletin board, relating to tennis camps, film processing, magazine subscriptions, and insurance applications. As previously noted, since at least 1966, the hospital has permitted solicitation for the United Fund and for the Combined Jewish Philanthropies. These drives are publicized through newsletters accompanying paychecks, and tables have also been set up in the cafeteria for the distribution of pledge cards. Also, there is evidence of similar distribution of newsletters giving information concerning the establishment of a credit union for employees, inviting volunteers to provide medical assistance to Israel to contact a certain organization, and patient information booklets; on occasion, there have been collections within departments for employee gifts on such occasions as weddings, births, and so forth.

Counsel for the hospital, in his brief, lists "a sampling of the content of the union monthly leaflet," including, among other things, a complaint that there was so little linen that patients had to do without, allegations that the chest physical therapy department was understaffed during Sundays and evenings, that patients went without adequate nursing care for several months early in 1974, an

article in the July edition alleging that an employee claimed she was totally ignored during her stay at the hospital as a patient giving birth, an item in the September issue, commenting favorably upon an employee work stoppage in the main kitchen which included an inquiry as to whether the hospital administration really cared about patients and, if so, why were not good signs provided to direct patients out of the hospital and containing also the statement that "when weekend comes as far as dietary bosses are concerned, the patients can go to hell." Counsel for the hospital argues that the distribution of such literature "containing controversial, unsubstantiated statements that compromised the reputation of the hospital as a quality provider of patient care cannot be tolerated by the hospital nor should it be condoned or authorized by the board." Furthermore, he argues that the Board "should not permit a hospital environment to be infected with the virulent vitriolic vituperation which is self-evident in the propaganda" of the Union and maintains that the distribution of such literature would indeed upset patients and visitors whereas the literature, previously referred to, that has been allowed to be distributed, is "clearly noncontroversial innocuous and would not upset patients or patients' visitors."

In her brief, counsel for the General Counsel observes that it is "a delicate task" to weigh and balance conflicting rights such as are here involved where the right of employees to receive information about union organization guaranteed under Section 7 of the Act, and the right of an employer to use his property, are involved. She notes that the present case "is made even more complex by the rights of a third party, the rights of the patient," and that the "herculean task of weighing and measuring" must be approached with a view to arriving at a solution that

"causes the least amount of harm to the greatest number of interests." It is the position of counsel for the General Counsel that the rules of the Respondent "are restrictive because they are overbroad, that they are selectively enforced and that the reasons given for their enforcement are fallacious and deceptive." She then reviews the principal Board and court decisions in this area. In one of the early leading cases, *Peyton Packing Company, Inc.*, 49 NLRB 828 (1943), the Board made the following observations:

> The Act, of course, does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time. Working time is for work. It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours. Such a rule must be presumed to be valid in the absence of evidence that it was adopted for a discriminatory purpose. It is no less true that time outside working hours, whether before or after work, or during luncheon or rest periods, is an employee's time to use as he wishes without unreasonable restraint, although the employee is on company property. It is therefore not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee outside of working hours, although on company property. Such a rule must be presumed to be an unreasonable impediment to self-organization and therefore discriminatory in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline.

Subsequent decisions have applied and refined the *Peyton Packing* rule, and the present Board policy may be summarized as follows:

1) A rule forbidding distribution of union literature by employees in working areas is presumptively valid even when applied to working and non-working time.
2) A rule forbidding distribution in non-working areas during non-working time is presumptively invalid.
3) A rule forbidding union solicitation by employees during their non-working time, even though limited to working areas, is presumptively invalid.
4) A rule forbidding union solicitation during working time in any plant area is presumptively valid.
5) A presumption of validity may be overcome if it can be shown that the rule is discriminatory rather than attributable to the right of the employer to protect his legitimate property interests.

For the purposes of this decision, I assume that lunch periods of persons employed in capacities such as Schunior, are paid time.[2]

[2] See the Board's decision in *United Aircraft Corporation (Pratt & Whitney Division)*, 180 NLRB 278 (1969). In my decision in that case, which was adopted by the Board, I referred to decisions such as *Olin Industries* v. *N.L.R.B.*, 191 F. 2d 613 (C.A. 5), enforcing 86 NLRB 203 (1949), where the Board has held, with court approval, that free time, such as for lunch or rest periods, even though paid for, was properly to be regarded and treated as non-working time, during which union solicitation activities might be undertaken. In that case, the court observed that the Board has "properly approached this problem of solicitation on company property on the basis of the distinction between actual and non-working time, rather than on the basis of the immaterial distinction between paid and unpaid time." However, in the *United Aircraft* case I came to the conclusion that the term "working hours" appeared to have been equated with "paid time." Solicitation by non-employee organizers is treated differently; See, for example, *Babcock & Wilcox Co.*, —— U.S. —— (1956) and *Sabine Towing*, 205 NLRB No. 45 (1973).

The Board has dealt with this problem in several cases involving hospitals or nursing homes. Thus, in *Summit Nursing and Convalescent Home*, 196 NLRB 769 (1972), the Board prohibited union solicitation on company property even though it was on the employee's non-working time and in non-working areas. The Board there stated (at page 770) that it was "significant that employees were previously solicited, during working hours and in work areas, for gifts for departing employees, with the Respondent's knowledge," and that one employee engaged in selling dishes while at work with no apparent adverse effects upon the institution's operations. In addition, the Board found no evidence that the distribution of union literature created a litter problem or in any way interfered with the efficient operation of the institution.

In another recent case, *Bellaire General Hospital*, 203 NLRB 1105 (1973), the Board held invalid a rule which prohibited solicitation for a labor organization during nonworking time and the distribution of union literature during non-working time in nonwork areas. In that case, the Board ordered the employer to inform its employees "that they are free to engage in distribution of union literature in nonwork areas of its premises during nonworking time, and to engage in union solicitation on its premises, during nonworking time . . . ." (Page 1111.)

In the third case, *Guyan Valley Hospital, Inc.*, 198 NLRB No. 28 (1972), the Board affirmed the finding of its administrative law judge that a rule that prohibited solicitation in working areas during working hours was valid. In that case, the Board observed that the rule prohibited solicitation only in the "working area" of the hospital, without deciding on what precisely constituted working areas except that the administrative law judge referred to these as hallways, elevators, stairs, patients' rooms, gift shops and so forth.

Counsel for the General Counsel contends that the Respondent's rule, being overbroad, results in restricting the organization rights of employees. In the first place, the contention is made that employees are limited by reason of the rule to solicitation and distribution in the employee-only locker rooms. In this connection, it is noted that lockers are scattered throughout the hospital in some 63 locations, but that it is necessary to distinguish between lockers and locker rooms. Thus, there are only four large locker rooms plus two smaller rooms which in total contain 613 lockers available to employee organizers from all departments. In addition, there are locker areas containing 470 lockers, but available only to employees who are assigned lockers in those areas. In sum, counsel contends that this "simply does not give the 2,200 employees adequate opportunity to receive information from their fellow employees under Section 7." Moreover, some locker areas are quite small, which means that employees assigned space in those areas "could not receive literature there unless one of their members would distribute or solicit." Moreover, it is pointed out that these locker areas are in large part divided into male and female rooms, so that this further restricts their availability to all employees. Finally, counsel for the government notes that the Respondent "does not use the locker rooms to dispense information. There is no bulletin board in one large female locker room and the other female locker room has a bulletin board with nothing posted on it. Publicity concerning the overwhelming BAD campaign . . . was placed in some locker rooms while the rest of the hospital was apparently inundated by publicity."

Counsel for the government argues that the geographical location of the Respondent's hospital, in a busy urban area, and with many doors available for entrance or exit,

demonstrates that employees "may come and go without reaching public property for some distance." Furthermore, it is observed that hospital employees live in widely scattered areas, and that the Respondent has stated that it will not make a list of names and addresses of employees available to the Union unless an election has been ordered.

Counsel for the government further contends that it is an absurdity to restrict solicitation to the cafeteria area. Thus, it is pointed out that solicitation on a one-to-one basis has been underway for some time but, despite this, the Respondent was unable to show any instance of injury to patients. However, the restriction placed by the Respondent limiting solicitation or prohibiting solicitation even in the cafeteria obviously, so the argument runs, constitutes a violation of the Act "particularly since no special circumstances have been shown and no injury has occurred." The cafeteria is open at various hours from 6:30 a.m. to midnight, or a total of 8 hours, not counting the morning coffee break.

In a survey of cafeteria use conducted by the Respondent in conjunction with an anticipated renovation of the cafeteria the observation was made that the cafeteria "is used by outsiders at each meal, of which the most heavy usage is in the evening." It is, of course, obvious that patients using the cafeteria are reasonably ambulatory and, inasmuch as meals are provided on the various floors of the hospital, the percentage of patients using the cafeteria is relatively small. Counsel for the government states that it is not contended "that all non-patient non-work areas should be open to solicitation and distribution" but that, "where, as here, the cafeteria is obviously planned primarily for employees and actual employee use is high it is a violation of Section 7 to prevent employees from soliciting therein."

Pointing out that the Respondent utilizes the cafeteria area for communication with employees, as detailed previously, government counsel argues that it is thus clear that the Respondent "recognizes that the locker rooms are inadequate for distributing and gathering information. The most reasonable way to reach employees is through newsletters and through direct contact in the cafeteria and coffee shop. The Respondent uses both freely, allowing solicitation and distribution of non-commercial and commercial material."

It is additionally contended that further inconsistencies are apparent in the policy of the Respondent. Thus, it is pointed out that newsletters from the General Director are given to employees with their paychecks and that the checks and newsletters are customarily picked up by an individual from each department and then distributed in the department, or work area. Attention is called to the fact that these newsletters have been used for a variety of solicitations: for example, a letter dated October 31, 1974, called attention to the fact that the election ballot would carry a referendum question asking voters whether they approved the reorganization of state agencies that regulate health systems in the Commonwealth, and expressed the opinion that it seemed advisable to vote for reorganization. The newsletter of October 17, 1974, described the credit union and informed employees of a table set up outside the cafeteria at which they could register; the same letter told about the United Fund and suggested payroll deductions. In others, a scheduled meeting to answer questions with respect to the credit union was described and funds were requested for the Israel Emergency Fund.

I concur in the finding of Judge Constantine, approved by the Board, that inasmuch as the Respondent "sanc-

tioned solicitations of various kinds during working hours and approved of suppers prepared during such hours" the Employer's according of "solicitation privileges to non-union matters while withholding them when union activities were involved is disparate treatment forbidden by the Act."[3]

Finally, counsel argues that the contention of the Respondent that it is protecting the rights of patients is a "sham," and that the Respondent "is picking and choosing those activities thought to be noteworthy or in its own interest," observing that the only material "kept away from employees is that calculated to hurt the Respondent." In this regard, counsel notes that in the special newsletter from the general director under date of January 16, 1973 in which it was stated that "union organizers have been urging employees to have a union to represent them," and that it was his view that a union "has no place at Beth Israel Hospital" and that the "disruptive activities of the union organizers demonstrate their lack of true concern for both B.I. patients and employees." Additionally, he observed that "the Union's primary concern today is the thousands of dollars they will gain from employees' dues, dollars to come directly out of your pocket." Regarding the Respondent's stated concern for the well being of patients and visitors, counsel for the General Counsel notes that the January 1975 issue of Beth Israel News, which is distributed to visitors, on the first page, had a red headline entitled "RAPE RAPE" in which it was noted that rape "is the fastest growing violent crime in the United States." The article went on to state that as "a response to the increased incidents of the crime and the recognized needs of the victims, a multi-disciplinary team at the Beth Is-

[3] *Imco Container Company*, 208 NLRB No. 133 at page 13 of the Judge's Decision.

rael Hospital, . . . has organized a rape crisis intervention program."

To summarize, it appears to me that, upon analysis, the record shows that there are relatively few places where employees can congregate or meet on hospital grounds or in the nearby vicinity for the purpose of discussing non-work related matters other than in the cafeteria; secondly, the area in the neighborhood of the hospital is congested and provides no ready access to employees; finally, I am not persuaded that the Respondent has offered any convincing evidence to demonstrate that the rule is needed, either by reason of actual or suspected interference with patients, visitors or non-employees. Thus, I am unable to find that the Respondent has made a sufficient showing of impairment with its principal obligation, namely, the care of patients, to justify the rule. Accordingly, I conclude and find that the rule and its application and enforcement as revealed by this record are violative of the Act. In so finding, I do not mean to suggest that the Respondent is powerless in this situation. It would appear to me that the Respondent, either unilaterally or in conjunction with the representatives of its employees, could devise lawful regulations governing employee activity in this area.

III. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section II above occurring in connection with the Respondent's operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

Upon the basis of the above findings of fact and upon the entire record in this case, I make the following:

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By initiating, promulgating and maintaining a written rule prohibiting distribution of union literature, and union solicitation except on a "one-to-one" basis, in its cafeteria and coffee shop, the Respondent violated Section 8(a)(1) of the Act.

4. By issuing oral and written warnings to its employee, Ann Schunior, threatening her with discharge if she continued to distribute literature in the cafeteria, the Respondent violated Section 8(a)(3) and (1) of the Act.

5. The aforesaid unfair labor practices are unfair practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

IV. The Remedy

Having found that Respondent engaged in and is engaging in certain unfair labor practices it will be recommended that it cease and desist therefrom and take certain affirmative action deemed necessary to effectuate the policies of the Act. Having found that Respondent unlawfully initiated, promulgated and maintained a written rule prohibiting distribution of union literature and union solicitation except on a "one-to-one" basis, in its cafeteria and coffee shop, and issued oral and written warn-

ings to an employee, threatening said employee with discharge in the event she continued to distribute literature in the cafeteria, it will be recommended that the Respondent rescind the aforesaid rule, and expunge the written warning to said employee from her personnel record.

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in these proceedings and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[4]

ORDER

Respondent, Beth Israel Hospital, Boston, Massachusetts, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Disciplining employees or otherwise discriminating against them with regard to the tenure of their employment or any other term or condition of employment for engaging in concerted union activities for their mutual aid or protection, or in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Expunge from the personnel record of Ann Schunior the written warning issued to her concerning distribution of union literature in the Respondent's cafeteria.

[4] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, recommendations and recommended Order herein shall, as provided by Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(b) Rescind its written rule prohibiting distribution of union literature and union solicitation in its cafeteria and coffee shop.

(c) Post at its place of business in Boston, Massachusetts, copies of the attached notice marked "Appendix."[5] Copies of said notice, on forms provided by the Regional Director for Region 1, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by any other material.

(d) Notify the Regional Director for Region 1, in writing, within 20 days from the date of receipt of this Decision what steps the Respondent has taken to comply herewith.

Dated at Washington, D. C.

Ivar H. Peterson
/s/ Ivar H. Peterson
Administrative Law Judge

[5] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

FORM NLRB-4727 (9-69) APPENDIX JD-414-75

[Seals Omitted]

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

PERSONNEL DIVISION
MAY 4 1976

After a trial at which all sides had a chance to give evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post this notice and we intend to carry out the Order of the Board and abide by the following:

The Act gives all employees these rights:

To engage in self-organization
To form, join, or help unions
To bargain collectively through representatives of their choosing
To act together for collective bargaining or other mutual aid or protection
To refrain from any or all of these things.

WE WILL NOT do anything that interferes with, restrains, or coerces employees with respect to these rights.

WE WILL NOT discourage membership in Massachusetts Hospital Workers Union, Local 880, Service Employees International Union, AFL-CIO, or any other labor organization by discriminating against any of our employees because of their support of the Union and their activities in connection therewith.

WE WILL expunge from the personnel record of Ann Schunior the written warning given her for distributing union literature in the cafeteria.

WE WILL rescind our rule prohibiting distribution of union literature and union solicitation in the cafeteria and coffee shop.

BETH ISRAEL HOSPITAL, ET AL.
(Employer)

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 7th Floor - Bulfinch Building, 15 New Chardon Street, Boston, Massachusetts 02114 (Tel. No. 617 - 223-3300).

Appendix C

United States Court of Appeals for the First Circuit

No. 76-1318

NATIONAL LABOR RELATIONS BOARD,
PETITIONER,
v.
BETH ISRAEL HOSPITAL,
RESPONDENT.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before
COFFIN, *Chief Judge,*
CAMPBELL, *Circuit Judge,*
BOWNES, *District Judge.**

David F. Zorensky, Attorney, with whom John S. Irving, General Counsel, *John E. Higgins, Jr.*, Deputy General Counsel, *Carl L. Taylor*, Associate General Counsel, *Elliott Moore*, Deputy Associate General Counsel, and *Michael S. Winer*, Attorney, were on brief, for petitioner.
Robert Chandler, with whom *Stoneman, Chandler and Miller*, was on brief, for respondent.

April 29, 1977

CAMPBELL, *Circuit Judge.* Respondent, Beth Israel Hospital, is a major non-profit hospital of national reputation in Boston, Massachusetts. In 1975, the hospital had the following rule:

---

* Of the District of New Hampshire, sitting by designation.

"Hospital employees who want to solicit other employees for the Union or other causes may do so when they are not on their own working times, but only in two well-defined locations of the Hospital:
1) Employee-only areas — employee locker rooms and certain adjacent rest rooms; and
2) Cafeteria and coffee shop.

In the locker areas literature may be offered. In the cafeteria and coffee shop, conversations may take place on a one-to-one basis but there is to be no setting up of special tables, public distribution of literature nor any form of coercion. Elsewhere within the Hospital, including patient-care and other work areas, the lobbies, corridors, elevators, libraries, meeting rooms, etc., there is to be no solicitation nor distribution of literature. Soliciting of patients and visitors is expressly prohibited at all times and places."

While this rule was in effect, an employee, Ann Schunior, distributed a union newsletter in the hospital cafeteria. She was given a verbal warning by a superior and subsequently notified in writing that she would be fired if she persisted in such activities. Charges were thereupon filed by the Massachusetts Hospital Workers' Union, Local 880, Service Employees International Union. The Regional Director of the N.L.R.B. issued a complaint that the promulgation of the hospital's rule against distribution of union literature in the cafeteria and coffee shop, and limiting solicitation there to a one-to-one basis, violated § 8(a)(3) and (1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3) and (1). The hospital's warnings to Ms. Schunior were alleged also to violate § 8(a)(3) and (1). While the complaint was pending, the hospital promulgated a new rule flatly banning solicitation and

distribution by employees in the cafeteria and coffee shop and other areas open to the public.[1]

After a hearing on the complaint, the Administrative Law Judge ruled that "[b]y initiating, promulgating and maintaining a written rule prohibiting distribution of union literature, and union solicitation except on a 'one-to-one' basis, in its cafeteria and coffee shop, the Respondent violated Section 8(a)(1)." The ALJ's proposed remedial order required the hospital to rescind its written warning to employee Schunior and "[r]escind its written rule prohibiting distribution of union literature and union solicitation in its cafeteria and coffee shop." The ALJ also proposed a broad order prohibiting discrimination against or discipline of employees "for engaging in concerted union activities for their mutual aid or protection, or in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7."

In a brief memorandum decision, 223 N.L.R.B. No. 188 (1976), a three member panel of the Board affirmed the ALJ's "rulings, findings and conclusions". The Board went on, in its formal order, to adopt the substance of the ALJ's recommended order including that portion requiring the hospital to "[r]escind its written rule prohibiting distribution of union literature and union solicitation in its cafeteria and coffee shop." The Board,

[1] "There is to be no soliciting of the general public (patients, visitors) on Hospital property. Soliciting and the distribution of literature to BI employees may be done by other BI employees, when neither individual is on his or her working time, in employee-only areas — employee locker rooms and certain adjacent rest rooms. Elsewhere within the Hospital, including patient-care and all other work areas, and areas open to the public such as the lobbies, cafeteria and coffee shop, corridors, elevators, gift shop, etc., there is to be no solicitation nor distribution of literature.

"Solicitation or distribution of literature on Hospital property by *non-employees* is expressly prohibited at all times.

"Consistent with long-standing practices, the annual appeal campaigns of the United Fund and of the Combined Jewish Philanthropies for voluntary charitable gifts will continue to be carried out by the Hospital."

however, also appended the following footnote 2 to its decision:

> "Subsequent to the Administrative Law Judge's Decision in this case, the Board in St. John's Hospital and School of Nursing, 222 N.L.R.B. No. 182 (1976), held that restrictions on solicitation and distribution in patient access areas such as cafeterias violates Sec. 8(a)(1) of the Act. Accordingly, the Respondent also violated Sec. 8(a)(1) by maintaining an overly broad no-solicitation, no-distribution rule that prohibited all solicitation and distribution in all areas to which patients and visitors have access and employees have access during nonworking time other than immediate patient care areas." *Id.*, slip op. at 1 n.2.

Resisting the Board's petition for enforcement, Beth Israel argues that curtailing solicitation and distribution in the cafeteria and coffee shop is justified by the special circumstances of a health-care institution. Some of its out-patients and in-patients visit the cafeteria and coffee shop during the day and will, it is contended, be upset by the "table-hopping" and sometimes heated discussions which accompany union solicitation and distribution. The hospital also points out that some of the union literature distributed in the past has been harshly critical of the quality of health care which the hospital provides. Beth Israel suggests that its legitimate desire to prevent such literature from falling into the hands of patients and visitors, and thereby upsetting them, justifies its no-distribution rule.

Beth Israel also challenges the Board's footnoted conclusion that the hospital violated Section 8(a)(1) by maintaining an overly broad rule prohibiting all solicitation and distribution in all areas to which patients and visitors

have access "other than immediate patient care areas". The hospital fears that this footnote will be read as expanding the scope of the Board's decision and order so as to mandate the allowance of organizational activity throughout the hospital in all except the most obvious patient care areas. The hospital maintains that such a reading would result in extreme unfairness to it, by cutting off all future opportunity to show the harmful effects upon patients of organzational activity in other parts of the hospital. The complaint made no reference to areas other than the cafeteria and coffee shop and no evidence as to the effects of union activity in other areas was introduced at the hearing.

Principles governing an employer's limitation of solicitation and distribution by employee union organizers are by now fairly well settled. Rules which prohibit union solicitation on the employer's property during nonworking time in any location have been held to be presumptively unreasonable and discriminatory in the absence of evidence of special circumstances to justify them. *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793, 804 (1945); *D'Youville Manor* v. *NLRB*, 526 F.2d 3, 5 (1st Cir. 1975); *St. John's Hospital & School of Nursing*, 222 N.L.R.B. No. 182, slip op. at 2, *appeal docketed*, No. 76-1130 (10th Cir. 1976). Rules prohibiting distribution of literature are likewise said to be presumptively invalid if applied during non-working time in non-working areas. *Food Store Employees Local 347* v. *NLRB*, 418 F.2d 1177, 1180 (D.C. Cir. 1969); *IAM District 9* v. *NLRB*, 415 F.2d 113, 115 n.5 (8th Cir. 1969); *NLRB* v. *Orleans Manufacturing Co.*, 412 F.2d 94, 96 (2d Cir. 1969); *Winchester Spinning Corp.* v. *NLRB*, 402 F.2d 299, 303 (5th Cir. 1968); *St. John's Hospital, supra.* In this case, the application of the employer's no-solicitation, no-distribution rules to the cafeteria and coffee shop banned

concerted activities in non-working areas during non-working time. The burden, therefore, was on the hospital to show that special circumstances justified its curtailment of protected activities in these two places.

We are unable to say, on this record, that the Board was compelled to hold that Beth Israel met this burden. The Board views a hospital's "basic function" as the provision of patient care: it has accordingly declined to accept rules cutting back on organizational rights in non-patient care areas unless the hospital shows that the curtailed activity will impinge upon patient care.[2] The hospital argues that solicitation and distribution activities among employees might "offend or upset patients and their visitors" gathered in the cafeteria and coffee shop, but the Board could conclude that such activities in these public areas would not constitute a sufficient threat to the treatment of patients, or to their recovery, to justify depriving employees of their organization rights. There was evidence of very substantial employee use of such areas, and the Board had to weigh the probable effect on ambulatory patients and visitors of employee solicitation and distribution activities in these natural gathering areas against the harm to employees of a ban. Beth

[2] The Board in *St. John's Hospital & School of Nursing*, 222 N.L.R.B. No. 182, slip op. at 4 n.3, *appeal docketed*, No. 76-1130 (10th Cir. 1976), indicated that it would focus only on the employer's "basic function" in assessing the validity of the proferred justfication for curtailing employees' concerted activities. Since a hospital's patient care function is believed not to be impaired by organizational activities in cafeterias and like areas, the Board refused to apply to hospitals its precedents upholding no-solicitation rules when applied to non-working-time activities of employees in department store sales floors and lunchrooms. *E.g., Goldblatt Bros., Inc.*, 77 N.L.R.B. 1262, 1263-64 (1948); *May Dept. Stores Co.*, 59 N.L.R.B. 976, 981 (1944), *enforced*, 154 F.2d 533 (8th Cir.), *cert. denied*, 329 U.S. 725 (1946). While reasonable minds might differ as to the validity of such a distinction, we cannot say that the Board acted irrationally in viewing hospital cafeterias differently, given the different factors affecting the different sorts of institutions, their employees, and their clientele. We owe deference to the Board's application of the Act to the varying circumstances of employer-employee relations. *See NLRB* v. *Pipefitters Local 638*, 45 U.S.L.W. 4144, 4149 (U.S., Feb. 22, 1977); *NLRB* v. *Truck Drivers Local 449*, 353 U.S. 87, 96 (1957).

Israel asserts that patients witnessing "table-hopping" and heated pro- and anti-union discussions will be subject to anxiety as they worry about "the security of their environment." But this assumes that irresponsible behavior will be the norm, and gives no weight to the fact that only ambulatory patients visit the cafeteria and coffee shop. We think the Board was entitled to reject this line of argument as unduly speculative.[3] This is not to say that the Board does not bear a heavy continuing responsibility to review its policies concerning organizational activities in various parts of hospitals. Hospitals carry on a public function of the utmost seriousness and importance. They give rise to unique considerations that do not apply in the industrial settings with which the Board is more familiar. The Board should stand ready to revise its rulings if future experience demonstrates that the well-being of patients is in fact jeopardized. *See St. John's Hospital, supra*, slip op. at 3-4 (ban valid in "patient care areas" where greater likelihood of upsetting ill patients can be shown).

Beth Israel argues that its no-distribution rule will prevent the union's "scurrilous" attacks on the hospital's health care from falling into the hands of patients or visitors. There was no evidence, however, that literature, offensive or otherwise, was distributed to patients or visitors. Employee Schunior testified that she took care to distribute only to employees. If in the future employee organizers deliberately distribute "scurrilous" literature

[3] The Board's conclusion that the hospital had not carried its burden of showing special circumstances receives further support from the ALJ's supported finding that numerous non-union distribution activities have been routinely permitted in the cafeteria and coffee shop. *William L. Bonnell Co.* v. *NLRB*, 405 F.2d 593, 595 (5th Cir. 1969); *NLRB* v. *Electro Plastic Fabrics, Inc.*, 381 F.2d 374, 376 (4th Cir. 1967). *See Schwarzenbach-Huber Co.* v. *NLRB*, 408 F.2d 236, 256 (2d Cir.), *cert. denied*, 396 U.S. 960 (1969).

to patients or visitors, the hospital may well have cause to discipline such employees. *Cf. NLRB* v. *Local 1229, IBEW* (*Jefferson Standard Broadcasting Co.*), 346 U.S. 464 (1953). In any event, the hospital cannot justify a rule prohibiting distribution to employees of all types of literature on the ground that some of the literature may be scurrilous. Such an argument might at most justify a rule directed at offensive literature. We conclude that the Board did not err in finding that the hospital had not justified its no-solicitation, no-distribution rule as it related to the cafeteria and coffee shop.

We have much more sympathy with Beth Israel's criticism of the Board's finding, appearing in footnote 2 of its decision, of a § 8(a)(1) violation founded upon the rule's applicability to all other non-patient-care areas. Footnote 2 can be read in several ways. Arguably, it merely cites *St. John's Hospital, supra,* as additional authority for finding invalid an "overly broad" rule which outlaws solicitation and distribution in areas "such as cafeterias." Such a reading of the footnote is consistent with the rest of the Board's decision and order which applies only to the particular areas focused on by the ALJ, i.e., the cafeteria and coffee shop. On the other hand, the footnote can also be interpreted as a binding determination that solicitation and distribution must be permitted, without limitation, in "all areas . . . other than immediate patient care areas." Such is the interpretation urged on us by the Board's counsel in seeking enforcement of the order in this case.

Without any facts in the record pertaining to the appropriateness of solicitation and distribution restrictions in areas other than the cafeteria and coffee shop, or any indication that the Board was focusing on other areas, we are unwilling to give such a broad interpretation to

its puzzling footnote.[4] Counsel's post hoc rationalizations cannot serve to fill a critical gap in the record. *NLRB* v. *Metropolitan Life Insurance Co.*, 380 U.S. 438, 443-44 (1965). Moreover, the Board did not clarify or expand the ALJ's proposed order which, given the narrow focus of his decision, could not have been intended to apply outside the cafeteria and coffee shop. We are also constrained to give a narrow reading to the Board's decision and order in view of the fact that the Board has only recently been given jurisdiction over non-profit hospitals. The law affecting solicitation and distribution in these hospitals is still largely undeveloped and we think that it would be particularly inappropriate for the Board to be adjudicating patients', hospitals' and employees' rights in as cursory a fashion as would be indicated by giving a broad reading to footnote 2 in this case.

We thus make plain that we interpret the Board's decision and order as adjudicating no more than the status

[4] The Board argues that Beth Israel itself put in issue all non-patient-care areas and therefore should not be heard to argue that the Board improperly determined the rule's legality in all such areas. We understand Beth Israel at most to have argued that it, *qua* hospital, had the right to ban all solicitation and distribution on its premises. While this argument obviously goes too far, we do not see it as inviting the Board, in one fell swoop, to adjudicate the status of all other areas even though the record contained no information pertaining to these other areas. Nowhere other than in the ambiguous footnote does the Board indicate that it focused on the rule's application to particular non-patient-care areas beyond the cafeteria and coffee shop.

The Board also argues that if it improperly expanded the scope of its inquiry to invalidate the rule in all non-patient-care areas, Beth Israel waived its right to raise this issue on appeal by failing to petition the Board for reconsideration of its decision. *See* § 10(e), 29 U.S.C. § 160(e); *ILGWU* v. *Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975). If the Board's footnoted addition to its decision were unambiguous, this procedural argument might have merit. However, we do not believe the language of the footnote would have put the hospital on notice that the decision was to be read as adjudicating the status of all non-patient-care areas. One would scarcely expect the Board to use a footnote to make a binding ruling of this nature. This broad interpretation of the footnote apparently first came to Beth Israel's attention when an ALJ in another proceeding pronounced himself bound by the Board's footnote to hold that the no-solicitation, no-distribution rule was invalid in all public areas. Since footnote 2 did not give the hospital fair warning that its decision would be construed as an adjudication binding Beth Israel with respect to all non-patient-care areas in its hospital, we reject the Board's argument that § 10(e) prevents the hospital from arguing here that a narrow reading should be given to footnote 2.

of the cafeteria and coffee shop. The order proposed by the ALJ and adopted by the Board required the hospital to "[r]escind its written rule prohibiting distribution of union literature and union solicitation in its cafetera and coffee shop." We think this fairly obviously was intended to regulate only the two mentioned areas. To avoid any question we shall enforce that order only as amended to read, "[r]escind *that part of* its written rule prohibiting distribution . . . [etc.]".[5] In so doing we in no way suggest that union activity may properly be banned in other public areas. It may well turn out that a rule banning distribution and solicitation is likewise invalid in many other non-patient-care areas accessible to patients and visitors as well as employees. But we think that the hospital should not be foreclosed from demonstrating that special circumstances justify a different result elsewhere.[6] Since we refuse to enforce the order in areas other than the cafeteria and coffee shop, the hospital is not collaterally estopped from litigating the propriety of the rule in other areas. *See W. W. Windle Co.* v. *Commissioner,* No. 76-1249 (1st Cir. Jan. 21, 1977), slip op. at 6-7, and the authority therein cited. *See also Martin* v. *Henley,* 452 F.2d 295, 300 (9th Cir. 1971); *International Refugee Organization* v. *Republic S.S. Corp.*, 189 F.2d 858, 862 (1951).

Finally, we decline to enforce paragraph 1 of the Board's order which broadly prohibits interference with "concerted union activities" and "the exercise of [employees'] rights guaranteed in Section 7 of the Act."[7] A non-profit

[5] The "notice to employees" ordered by the Board to be posted should also be reworded to reflect this clarification of the order.

[6] We would add that a phrase like "immediate patient-care areas" is far from self-defining given the complexity of a major metropolitan hospital. Would a waiting area by the nurse's desk on a floor where patients reside be a "patient-care area?" Would the waiting room in the emergency ward?

[7] The Board made the order even broader than the ALJ proposed by substituting "in any other manner" for "in any like or related manner".

hospital's concern about the possible effect on patients of organizational conduct in parts of the institution can hardly be dismissed as unreasonable when registered at a time when guidelines are still in flux and are in the process of being formulated through administrative and court proceedings. We do not think it can reasonably be inferred from a single violation of this character that the hospital has a proclivity knowningly to violate the Act, thus justifying a broad order. *See NLRB* v. *Curtis Manufacturing Co.*, 421 F.2d 1335, 1337 (5th Cir. 1970); *J.P. Stevens & Co.* v. *NLRB,* 417 F.2d 533, 539 n.11 (5th Cir. 1969); *NLRB* v. *Ochoa Fertilizer Co.*, 283 F.2d 26, 30 (1st Cir. 1960) (citing cases), *rev'd on other grounds,* 368 U.S. 318, 400, 401 (1961). The Supreme Court has held that an isolated violation of the Act "does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged." *NLRB* v. *Express Publishing Co.*, 312 U.S. 426, 433 (1941). *See also General Motors Co.* v. *NLRB,* 512 F.2d 447, 448 (6th Cir. 1975); *NLRB* v. *Curtis Manufacturing Co., supra*; *NLRB* v. *Richards,* 265 F.2d 855, 861 (3d Cir. 1969). *See NLRB* v. *Kingwood Mining Co.*, 404 F.2d 348 (4th Cir. 1968); *NLRB* v. *Scherer & Sons, Inc.*, 370 F.2d 12, 13 (5th Cir.), *cert. denied,* 389 U.S. 836 (1967).

Except as indicated above, the Board's order will be enforced.

So ordered.

Adm. Office, U.S. Courts— Addison C. Getchell, Inc. Legal Printers Boston

Supreme Court, U. S.
FILED
MAR 3 1978
MICHAEL RODAK, JR., CLERK

APPENDIX.

IN THE

Supreme Court of the United States

October Term, 1977.

77-

No. 152.

BETH ISRAEL HOSPITAL,

PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD,

RESPONDENT.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

DOCKETED JULY 27, 1977.

CERTIORARI GRANTED JANUARY 16, 1978.

Table of Contents.

Chronological List of Relevant Docket Entries	1
Transcript Excerpts	3
Joint Exhibit 1 — Employees Handbook	55
Joint Exhibit 2 — Newsletter from the General Director — 23 July 1970	59
Joint Exhibit 3 — Special Newsletter from the General Director — 16 January 1973	61
Joint Exhibit 4 — Letter of 25 January 1973	62
Joint Exhibit 5 — Newsletter from the General Director — 22 March 1973	63
Joint Exhibit 7 — Special Newsletter from the General Director — 18 October 1973	64
Joint Exhibit 10 — Newsletter from the General Director — 11 July 1974	65
Joint Exhibit 12 — Newsletter from the General Director — 19 September 1974	68
Joint Exhibit 14 — Newsletter from the General Director — 6 March 1975	70
Joint Exhibit 15 — Letter from Mass. Hospital Workers to Dr. Rabkin of 22 October 1974	71
Joint Exhibit 16 — Letter from Dr. Rabkin to File of 25 October 1974	73
Joint Exhibit 17 — Warning Notice from Beth Israel Hospital to Ann Schunior — 25 October 1974	75
Joint Exhibit 18A — As We See It — April 1974	76
Joint Exhibit 18B — As We See It — May 1974	76
Joint Exhibit 18C — As We See It — June 1974	76
Joint Exhibit 18D — As We See It — July 1974	76
Joint Exhibit 18F — As We See It — September 1974	81

Joint Exhibit 18G — As We See It — October 1974 83
Joint Exhibit 18H — As We See It — November 1974 97
Joint Exhibit 18K — As We See It — February 1975 99
Joint Exhibit 18L — As We See It — March 1975 99
Joint Exhibit 18M — As We See It — April 1975 107
Joint Exhibit 20 — Floor Plan 109
Joint Exhibit 21A — Photo — South Side of Cafeteria 111
Joint Exhibit 21B — Photo — Travel Brochure Rack and Non-Official Bulletin Board 112
Joint Exhibit 21C — Photo — Non-Official Bulletin Board 113
Joint Exhibit 21E — Photo — Vending Machine in Coffee Shop 114
Joint Exhibit 22A — Newsletter from the General Director — 30 November 1972 115
Joint Exhibit 23A — Employee Publication 115
Joint Exhibit 23B — Warning Notice from Beth Israel Hospital to Peter Gerace — 19 March 1975 119
Joint Exhibit 24 — Patient Information Booklet 120
Joint Exhibit 25A — Memorandum — 15 April 1975 123
Joint Exhibit 27B — Newsletter from General Director — 23 January 1975 126
Joint Exhibit 28E — Newsletter from the General Director — 8 August 1974 126
Joint Exhibit 29B — Newsletter from the General Director — 17 October 1974 126
Joint Exhibit 31 — Locker Room Charts 127
Joint Exhibit 32 — Newsletter from the General Director — 30 May 1974 135

Respondent's Exhibit 2 — Newsletter from the General Director — 20 September 1975 135
Respondent's Exhibit 3(a) — Memo of 29 July 1971 136
Respondent's Exhibit 3(b) — Newsletter from the General Director — 30 September 1971 137
Respondent's Exhibit 3(c) — Memo of 19 July 1973 138
Respondent's Exhibit 3(d) — Memo of 17 October 1974 138
Respondent's Exhibit 4 — Newsletter from the General Director — September 1972 139
Notice — Writ of Certiorari Granted 16 January 1978 143

Chronological List of Relevant Docket Entries.

10-29-74	Charge filed.
2-21-75	Complaint and notice of hearing dated.
2-26-75	Respondent's answer to complaint and notice of hearing received.
4- 9-75	Amendment to complaint dated.
4-10-75	Regional Director's teletype rescheduling hearing dated.
4-22-75	Respondent's answer to amendment to complaint received.
4-24-75	Hearing opened.
4-25-75	Hearing closed.
6- 4-75	General Counsel's motion to amend record dated.
7-25-75	Administrative Law Judge's Decision issued.
9-19-75	Respondent's exceptions to Administrative Law Judge's Decision received.
4-30-76	Decision and Order issued by the National Labor Relations Board.
7-12-76	Board's application for enforcement.
7-29-76	Respondent's answer to application filed.
4-29-77	Opinion and Decree of U. S. Circuit Court of Appeals for the First Circuit issued.
5-19-77	Motion to stay order filed.
5-20-77	Denial of motion to stay order issued.
7-27-77	Petition for writ of certiorari.
1-16-78	Order granting certiorari issued.

Transcript Excerpts.*

Vol. 1

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION ONE

Case No. 1-CA-10,200

In the Matter of:

BETH ISRAEL HOSPITAL
Employer
and
MASSACHUSETTS HOSPITAL WORKERS' UNION LOCAL 880, SERVICE EMPLOYEES' INTERNATIONAL UNION, AFL-CIO
Respondent

Hearing Room 607
Bulfinch Building
15 New Chardon Street
Boston, Massachusetts
Thursday, April 24, 1975

The above entitled matter came on for hearing, pursuant to Notice, at 10:00 o'clock a.m.

BEFORE:

Honorable IVAR H. PETERSON, Administrative Law Judge

APPEARANCES:

JEANNE BAUM, Esq., Bulfinch Building, 15 New Chardon Street, Boston, Massachusetts, appearing as Counsel for the General Counsel.

CSA Reporting

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* Spelling errors in the original have not been corrected.

APPEARANCES (Continued):

ARNOLD M. MARROW, Esq., Bulfinch Building, 15 New Chardon Street, Boston, Massachusetts, appearing as Counsel for the General Counsel.

[2]

JONATHAN HIATT, Esq., Law firm of Angoff, Goldman, Manning, Pyle & Wanger, 44 School Street, Boston, Mass., appearing on behalf of the Union.

ROBERT CHANDLER, Esq., Law firm of Stoneman, Chandler & Miller, 79 Milk Street, Boston, Mass., appearing on behalf of the Employer.

VERNON C. STONEMAN, Esq., Law firm of Stoneman, Chandler & Miller, 79 Milk Street, Boston, Mass. appearing on behalf of the Employer.

[8]

MS. BAUM:

. . .

Now we have reached agreement as to many of the documents that we wish to introduce, and we are introducing them as joint exhibits.

[14]

MS. BAUM: Exhibit No. 21(a), a photo of the south side of the cafeteria.

(The document above-referred to was marked Joint Exhibit 21(a) for identification.)

MS. BAUM: Exhibit 21(b), another photograph of the travel brochure rack and the non-official bulletin board area in the cafeteria.

(The document above-referred to was marked Joint Exhibit 21(b) for identification.)

[15]

MS. BAUM: I think this next exhibit will show where that is. This is another picture, this time a color picture, 21(c), of the area which I believe is called the non-official bulletin board area which was described in Joint Exhibit No. 2.

(The document above-referred to was marked Joint Exhibit 21(c) for identification.)

MS. BAUM: Joint Exhibit 21(d), which is a color photograph of the car pool board.

(The document above-referred to was marked Joint Exhibit 21(d) for identification.)

. . .

MS. BAUM: At this time the parties have agreed to a stipulation that on March 3 through 10, 1975, there was a table set up in the dining room during National Nutrition Week which had literature which was distributed to employees and to visitors.

MR. CHANDLER: That's not what the stipulation was. There was no stipulation as to distribution. There was

literature that was on the tables, and it included nutritional ideas for employees as well as visitors and patients.

MS. BAUM: My apologies.

[16]

JUDGE PETERSON: The record will so show. It is received.

MR. CHANDLER: We can agree that someone was manning the table, yes.

JUDGE PETERSON: Very well.

. . .

MS. BAUM: Your Honor, parties have also agreed to stipulate that on the table underneath the bulletin board, the non-official bulletin board, literature is often left on the table that is considered commercial literature. We have several examples of that here, a tennis camp advertisement, an envelope for Kodacolor film, magazine subscription, an insurance application, etc.

MR. CHANDLER: Just for clarification purposes, the stipulation does not include who was responsible for putting the material on that table.

JUDGE PETERSON: Yes, I understand.

[18]

MR. CHANDLER: I have this Joint Exhibit 25, a survey that was conducted by the dietary department with Miss Lorraine Jacoby directing the survey. This is a four page document and the purpose of the survey at the time was to estimate the need for alerting Emmanuel College to the possibility of using their facility in the event that people utilizing the cafeteria would be moved over to Emmanuel College during a period of modernization and renovation of the cafeteria area.

(The document above-referred to was marked Joint Exhibit No. 25 for identification.)

MR. CHANDLER: We have also developed a stipulation as to how this survey was conducted. And I will give you a brief description of that.

The three volunteers each day were stationed at the top of a line of paying customers, people who would purchase from the line. And they were asked to identify themselves, and then a list of departments — the employees were broken down by department, and also as to whether they were employees or non-employees, and I think the survey speaks for itself.

The survey was conducted during the three meals, breakfast, lunch and dinner, and I believe that the hours of those three meals are delineated in the booklet "Patient Information" that is already in evidence.

In addition to the three meals, the cafeteria is also open for a coffee break from nine o'clock until nine forty-five,

[19]

at which time only coffee is served.

There are vending machines located in the north cafeteria and anyone who uses the cafeteria need not purchase items, by going through the line. They may purchase from these vending machines.

Employees and visitors to the cafeteria facility may elect to bring their own lunch without going through this line. Also, I thnk we would want to bring out that one individual may purchase items in the line for others, so that whether the individual was a guest or a visitor or an employee, he may be purchasing for two or three. This should be kept in mind when analysing the survey.

In addition to the three meals and the coffee hour, the cafeteria is open between the hours of 10:30 and midnight to staff officers.

The individual conducting the survey, Lorraine Jacoby, is the director of the dietary department. The cafeteria has a seating capacity of 275, and the average volume per day

of individuals who purchase through the line is 1,500 individuals.

. . .

MR. CHANDLER:

[20]

The cafeteria is set up for employees and for other individuals, and employees primarily use the cafeteria during their non-working time.

MR. HIATT: That's argument as to what it is set up for. The choice of words is all I object to.

MR. CHANDLER: Let's change that stipulation to read that employees who use the cafeteria generally use it during their non-working time.

JUDGE PETERSON: Is that agreeable?

MS. BAUM: Yes.

MR. CHANDLER: The normal visiting hours at the hospital are from 2:30 p.m. until 8:00 p.m., although on page 8 on the patient information booklet the hours are listed in detail.

I think that sums up the stipulations on the survey and the cafeteria details.

JUDGE PETERSON: Very well.

Does General Counsel concur in that?

MS. BAUM: Yes.

MR. MARROW: Yes.

MS. BAUM: Your Honor, we have further agreed to stipulation —

MR. CHANDLER: Excuse me. I think there is one other thing that we omitted, and that is the coffee shop, the physical set up of the coffee shop which is in the immediate vicinity of the cafeteria.

MS. BAUM: We haven't discussed this at all before.

[21]

MR. CHANDLER: It has a seating capacity of approximately 30 people, and there are vending machines in this area.

MS. BAUM: It's also open 24 hours.

MR. CHANDLER: Open 24 hours a day.

JUDGE PETERSON: All right.

MS. BAUM: A further stipulation concerns the solicitation-distribution of literature that has gone on since at least 1966, and probably before for the Combined Jewish Philanthropies and the United Fund. These are publicized through newsletters accompanying paychecks.

In the most recent United Fund campaign, tables were set up for distribution of literature in the cafeteria. And there is also personal distribution of pledge cards.

JUDGE PETERSON: Is that agreeable with you, Mr. Chandler?

MR. CHANDLER: Yes, with the understanding that these are the only two authorized campaigns that are specifically permitted by the hospital.

[23]

MR. CHANDLER: The parties have agreed to stipulate that there are certain areas, for the purposes of definition, that will come into play in this matter. We have defined them as follows.

There are work areas in which employees are to perform work. Those areas include patient areas, but are not limited to patient areas. There are employee only areas which include locker rooms and in some cases adjacent restroom facilities.

We will submit on a joint basis an exhibit that will further define where the locker room areas are located, and how many there are, and who has access to them.

There are also public areas within the hospital which include the gift shop, rest rooms, corridors, elevators and lobbies. I think both the parties and the Board understand the question as to whether the coffee shop and cafeteria are public area as opposed to employee area is the reason

[24]

why we are here today.

MR. HIATT: It's an issue; it's not the only issue.

JUDGE PETERSON: Is that agreeable?

MR. CHANDLER: Yes.

MS. BAUM: Yes.

[30]

MRS. BAUM: The parties have also agreed to the following stipulation:

That solicitation among employees — strike that.

On occasion there have been collections for the usual types of employee gifts for wedding gifts, baby gifts, et cetera, within that individuals department.

JUDGE PETERSON: All right, proceed.

MRS. BAUM: Your Honor, we have a rather cumbersome exhibit here, a large map of the floor of the hospital that contains a cafeteria. We would like to have permission to duplicate the area that is pertinent and not the whole area.

JUDGE PETERSON: All right.

MRS. BAUM: This is Exhibit No. 20.

JUDGE PETERSON: That's the layout map of the cafeteria.

MRS. BAUM: And we would at this time like to — Ms. Cronin, the personnel director, to explain and mark the map.

Whereupon,

ANNE CRONIN

was called upon as a witness, by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

[31]

DIRECT EXAMINATION

Q. (By Mrs. Baum) Ms. Cronin, what is your position in the hospital?

A. Director of personnel services.

Q. All right.

At this time I would like to have a clear picture of what this map is supposed to represent. Would you please describe it so the record will be able to understand?

A. This map, which is outlined in red — although the copy will probably not come out in red — is the area in the hospital in the second floor which serves as the cafeteria and coffee shop for the hospitals patients, visitors, volunteers, et cetera.

There are two main entrances —

Q. Could you mark those?

A. How do you want me to mark them, with an X?

Q. With an X.

A. Two main entrances to the cafeteria, which I am marking with an X. There is also a third entrance to the cafeteria, I might say there are two main entrances and exits to the cafeteria, which are marked with an X. And another one, which has entrance and egress, I believe, to the research building immediately adjacent. That is at the far end of the

[32]

southeast corner of the cafeteria. I shall mark that with a double X.

The two main entrances to the cafeteria, which I indicated before, lead to serving lines of the cafeteria. I shall mark those with SL. One is on the so-called north side of the cafeteria. And, the other is on the so-called south side of the cafeteria.

Running through the center part of both sides of the cafeteria are the serving lines. They are open except for the

barriers of the steam tables in the cafeteria line. At the end of those lines would be the cashiers, for each serving line. I will put a C there to indicate where the cashiers sit.

Immediately behind this area is a somewhat enclosed area, except at the extreme southerly end of it, and that is the dish room, which I will mark with a DR, where the washing of dishes take place, and the trays.

Now, on either side of the cafeteria, that is on either side of the steam tables, are the seating areas for the people who use the cafeteria. That is clearly marked here I think on the map by lines which indicate dining areas.

The employees have the choice of going through either line of the cafeteria that they want, and sitting really on any side, any side they wish to, to have their lunch.

The seating area on the south side of the cafeteria

[33]

is larger than the seating area on the north side of the cafeteria. For the simple reason that the north side of the cafeteria, at the near — near the entrance does have a series of small offices, which are used by the dietary personnel. That explains the difference in the seating capacity.

I don't know whether there is anything else you wanted described in the cafeteria itself, but I can talk about the coffee shop.

Q. We discussed yesterday the nonofficial bulletin, could you please mark where that is?

A. The area for the nonofficial bulletin board in the cafeteria is, I will mark that PB. At the far end, I guess I would call it the southerly end of the south side of the cafeteria, which employees would pass when they go to bring back their trays and distribute the silver for washng and so forth and so on. So, it is in the little corner there marked PB.

Q. And you refer to the north side and the south side of the dining room, this is essentially then is one dining room?

A. Yes.

Q. And the only employee dining room?

A. Yes.

On the drawing —

MR. CHANDLER: I will have to object to the form of

[34]

that question and the answer.

She said the only employee dining room. I think we have a stipulation in the record that it is used by employeed, but it is not —

MRS. BAUM: If I may amend, I would like to omit employee. The only dining room.

JUDGE PETERSON: All right.

THE WITNESS: There is also an area here on this chart which is clearly coffee shop. This has a — one entrance and one exit. And, at the rear of that room — this is a closed in room. At the rear of that room there are several vending machines for cold drinks, hot drinks, hot drinks, and a few other kinds of snacks.

This coffee shop is — seats I think maybe 30 to 35-40 people if it is fully occupied. And it is open 24 hours a day.

Q. (By Mrs. Baum) Where are the vending machines in the cafeteria itself that we discussed yesterday?

A. On the north side of the cafeteria. There are a couple of vending machines for hot and cold drinks. And I will mark the area with a VM.

They are up against the wall, the back wall of one of the offices of — that are used by the dietary department.

[35]

CROSS EXAMINATION

Q. (By Mr. Chandler) Ms. Cronin, you have indicated where the nonofficial bulletin board is. Is that the same

area in which the magazine rack for travel literature and commercial literature is located?

A. Yes.

Q. And there was an exhibit introduced into evidence yesterday, Joint Exhibit 21(d), which is a carpool board that was posted in the cafeteria area. Can you indicate where that —

A. Yes, that is in the same area which I have put on the map and marked PB. It is really against the wall opposite the rear windows of this little area.

. . .

REDIRECT EXAMINATION

Q. (By Mr. Hiatt) Can you also note for the record where the nutrition table was set up the week of the leaflets were distributed from a table?

A. No, I could not, because I didn't happen to go over to the cafeteria that week. I really couldn't indicate it. I

[36]

suspect that we sometimes —

MR. CHANDLER: If you don't know —

THE WITNESS: I really don't know.

Q. (By Mr. Hiatt) Possibly you could also note where the person was standing, the volunteer was standing who took the survey that has been introduced as part of exhibit —

A. I have been told by the director of dietetics that it was right here, why don't I put V on either side of the beginning of the cafeteria line. I didn't observe it, she told me that's where they were.

RECROSS EXAMINATION

Q. (By Mr. Chandler) Could you indicate for the record what the area surrounding the cafeteria are?

A. Well, I will try. This area here is all windows looking out on the back part of the hospital.

JUDGE PETERSON: By that you are indicating the area facing where the legends are, where the writing is.

THE WITNESS: Right.

This is all windows running along there.

JUDGE PETERSON: And that would be what direction, direction-wise?

THE WITNESS: Going west — north. Sorry, because they call this the south building, that is really south, but in my opinion it is almost west, but I guess it is aouthwest.

[37]

JUDGE PETERSON: Thank you.

THE WITNESS: There are windows here at the end of the cafeteria, and I would call that really almost directly south.

Now, on this side — I have indicated here that this is the entrance and exit to the research building.

Q. (By Mr. Chandler) That is where the double X's are?

A. Yes, so that would be just a door stairwell.

All along here, along this —

Q. That is the east side is it?

A. It's called the north side.

Q. North side?

A. Yes.

All along here this is really a wall now. It was formerly windows, but when this construction was built several years ago, this is now a wall.

On the other side of this — there is no way of getting out through this wall.

On the other side of this, on the second floor, I believe, that is 2 East.

Q. Where is 2 East?

A. Over here, all of this.

Q. They are labeled E — and they are patient rooms?

A. Yes, I believe these are used — I know I have got two gentlemen in here who could tell me what these are, but it

[38]

is all blocked off from the cafeteria. I really can't tell you.
Q. You indicated that there are three entrances and exits to the cafeteria. What is immediately on the outside of each of those entrances and exits?
A. Okay. As I said this double X here is the stairway into the research building, one of the reserach buildings.

Here at these two doorways is really a corridor that runs on — along here. At this end of the corridor is one of the dietary offices.

Over here is the Dietetic lounge, the lunge [sic] the dietary interns use for classes, et cetera.

MRS. BAUM: Can I ask that she mark that?

THE WITNESS: Dietetic interns — it is a conference room it is not a lounge.

And this is the dietary office. Dietary office, dietary office. Then as I indicated before, this is the entrance to and the exit to the coffee shop.

Now, this is a wall, all along here.
Q. (By Mr. Chandler) Yes.
A. And in front of that wall would be the main lobby of the hospital and at this point, it would be adjacent to the admitting office. And here would be the gift shop —
Q. Now, when you are saying this as a designated S-200, what is that area?

[39]

A. That is the lobby where the patients wait to be admitted to the hospital or where they may wait for the doctors to come down and give them a report on a patient. Around here I think are some private rooms where the doctors could take —
Q. Let the record show she is pointing now to S-2003, S-2007 and S-2005(a).

A. No, not 5(a), just 2007 and 2003.
Q. Those two rooms are for again?
A. They are the lobby and some small rooms that I think are used for individual conferences.
Q. Okay.
A. Now, right here in this area S-205 and S-2005(a) is the gift shop and the small storage room for the gift shop, which is run by the women's auxiliary. It is a gift shop for the hospital.

Along here leading into the main way to get into the cafeteria is a hallway.
Q. Now this is a corridor that runs then between S-2003 and S-2009?
A. Right.

That corridor leads off of the main corridor which runs on the second floor through the south building and the north building. And on the right wall of that corridor are three elevators which lead up to the patient floors.

[40]

FURTHER REDIRECT EXAMINATION

Q. (By Mrs. Baum) Is there a scale on this map?
A. I don't see one.
Q. This area at the bottom of the area that is marked as the dining area seems to be included as part of the cafeteria.
A. It actually is a corridor outside the cafeteria and coffee shop. Its the means of entrance and exit from the main part of the hospital.
Q. Could you mark the area that is a corridor and that is not included in the cafeteria?
A. I will draw a line from one end to the other, and out here at the side I will mark corridor.

[42]

MRS. BAUM: And here also I would like to have some testimony on it from Ms. Cronin.

Q. (By Mrs. Baum) This map does have a scale?

A. Yes.

Q. Where is the front of the hospital?

A. The front of the hospital is facing out on Brookline Avenue, which is marked on the map.

Q. Looking at the hospital from Brookline Avenue, to the left, it is bordered by what?

A. It is bordered by an iron rail fence, bordering the property of Immanuel College.

Q. Looking at the hospital from the front, what is on the righthand side?

A. The front right is the property of the Mass College of Art.

Halfway down, about on the right is a street, whch is a private way, called Binney Street. And then for the remaining part of the way down on the righthand side bordering the Beth Israel property is the Longwood Medical Building Trust.

Q. To the back of the Beth Israel property, what borders at that that point?

A. On the back on the left Immanueal College extends over to possibly about a third of the way. The rest of the property is almost entirely taken up by the Judge Baker Garden Center, with a small right of way between Im-

[43]

manuel and Baker, which obviously belongs the-to the Beth Israel Hospital, it is marked here. I don't know whether that right of way is exercised or not.

At the end of the Beth Israel property, just before you come to the end of it on the right is a 1200 foot wide easement which serves as an entrance and exits for anybody

who wants to then come in that way to the hospital from either the Children's Hospital or parking garage, or Black Fan Street, which is on the other side of the Judge Baker Garden Center.

Q. Could you mark that on the map please?

A. How would you like me to mark it?

Q. Entrance.

A. And exit. I will circle that so it will stand out a bit.

Q. This area that says Children's Hospital, that's a parking section —

A. That's a parking garage for Children's.

Q. Now you said there was a fence seperating Immanuel College?

A. All along the lefthand border, indicated on the map.

Q. Is there a fence along the back of the property?

A. Yes.

Q. Then how do Beth Israel employees get from the back of the property through to Black Fan Street?

[44]

A. Through this 1200 foot wide easement, which is indicated here.

Q. There is an opening in the fence at this point?

A. There is steps, it is a wide walkway and you can walk through there.

Q. Is there any entrance, an egress for cars in the back?

A. Not from that one.

Q. Is there another area in the back where cars may drive through?

A. All the wya around.

Q. You talked about all the way around on the Beth Israel property?

A. There is no way they can enter except this way, and exit here on the front.

Q. Now, directing your attention the the front of the hospital, there is an area in approximately the middle of this sketch that says "Right of Way for the Use of Lot B," does this still exit, this area here?
A. This area exits, but it is not available for anyone but the construction workers who are working on the new building, which is going up in that central area there.

The front of that area can be used as exits for the cars that go in this way, out onto Brookline Avenue.
Q. Now there was an area in front of the hospital buildings that is empty on this sketch. What is that area before it

[45]

hits Brookline Avenue?
A. Before it hits Brookline Avenue, this area here in this little section here has two large, I guess you would call them trailers, that are used for the Clerk of the Works of the Construction.
Q. Could you write trailers.
A. The rest of the area fronting right on — facing into Curstine Hall on the righthand side of the door are parking spaces. And all this area, all along here —
Q. The record can't —
A. All right.

All the area on the front of the lot in front of Curstine Hall, facing out onto Brookline Avenue has spaces for cars to park, with the exception of a small walkway from Brookline Avenue right to the main entrance of Curstine Hall, which I have indicated by a little line marked walkwy.
Q. This area in front, it is used as a street or an alley that cars drive up?
A. Are you talking about —
Q. Yes.

Here, right here.

A. Its employees, visitors and anybody coming into the hospital have a tendency to walk through there, but it is also an area that cars have to drive through.
Q. And this right of way on the righthand side of the

[46]

hospital building, is that an area for pedistrians or for cars?
A. It is primarily for cars, it is where they come into the garage or to get into the back of the hospital parking area, but people coming in either to the farage or to the hospital have a tendency to walk down that too.
Q. So that is not a public street?
A. No.

. . .

MR. CHANDLER: The parties would like to submit the following stipulation:

That the newsletters from the General Director are distributed in the following manner, authorized personnel from each department go to the payroll department to pick up payroll checks and at the same time, they pick up the appropriate number of newsletters, return to their respective departments and distribute the newsletters and the checks together. Except in a few instances where the departments are so large, such as in several nursing departments, in which case the employees may pick up the newsletters and check from the payroll — pick them up them-

[47]

selves at the department

. . .

[49]

MR. CHANDLER: . . . we have entered stipulations and we can agree that this hospital is in a metropolitan area.

It is in a college community, it is a busy section. I don't know what purpose is gained —

MRS. BAUM: That hasn't been on the record yet.

MR. CHANDLER: I am saying we will stipulate to that

[50]

rather than go through this line of questioning.

MRS. BAUM: I would agree to that stipulation.

. . .

ANTHONY AVENI

was called as a witness, by and on behalf of the Respondent and, having been first duly sworn, was examined and testifies as follows:

DIRECT EXAMINATION

Q. (By Mr. Chandler) You are an employee of the Beth Israel Hospital?

A. Yes, I am.

Q. What is your position?

[51]

A. Assistant director patient support services.

Q. And what are your responsibilities in that position?

A. I am the assistant to the director of patient support services, which include the department of dietary health keping distribution services, production services, communication services, and I probably have forgotten purchasing. That shoudl be it.

Q. Are you familiar with the campaign tht was conducted in March called, the BAD Campaign?

A. Yes, I am.

Q. And what was your role in that?

A. I was the coordinator of the BAD program.

Q. Could you tell us something about the campaign?

A. BAD program was a short duration high intensity cost reduction effort on the part of the Beth Israel.

Q. Can you teli us something as to how the program was conducted during this short period of time?

A. The program was basically consisted of three parts. The first part being a Teaster program, where week was put aside for stimulation for participation by employees by means of a sign campaign and payroll stuffers. The second, third, and fourth weeks of the campaign were used to retrieve from employees their so-called BAD ideas in order to save explicityl a dollar a day in the effort of their job.

[52]

The final part of the program was to review these suggestions, analyze them and then hopefully implement them with the idea of saving bottom line money on the hospital.

Q. BAD are the initials for Buck a Day?

A. Buck A Day. The tease week was intended to stimulate interest in what BAD meant, and then the kickoff week explaine what BAD stood for, Back A Day.

Q. Now what kinds of communications took place during the first week of the program?

A. To put the question in perspective, there were a group of some 65 employees who acted as team leaders for the various areas in the hospital. Communication with these employees was direct in meetings and through literature, thatthe program provided. Indicating how they would function as a team leader —

Q. Were there posters or other advertisements of the program placed throughout the hospital?

A. Yes, there were.

The program called for a five day program of each day placing in the hospital various teasing posters, to the

extent of explaining the BAD guys are coming, Watch for the BAD guys, and placed in the hospital.

Q. Were patients in any way made aware of the campaign of the program?

A. During the initial week they were not, intentionally made aware.

[53]

Q. And how is that?

A. The effort was to place the posters the size, the banner in nonpatient areas, non direct patient areas.

Q. And after the first week?

A. Once we had the kickoff day, which was after the five day program, and it was generally known and we explained what BAD stood for, we widespread distributed the posters and the banners explaining that BAD meant Buck A day.

Q. Was this explained to patients as well as employees?

A. For those patients that requested it, information, it was.

Q. Did you receive any complaints from patients or visitors as to the program?

A. To my knowledge, no.

Q. Did you receive any suggestions from visitors or patients to this program?

A. Yes, we did.

We received directly from inpatients approximately a half dozen suggestions. We received comments, verbal comments from many visitors in the corridors.

Q. What kind of verbal comments are you saying?

A. Complimentary comments.

Q. Do you have an estimate as to the what the cost savings were as a result of this program to the hospital?

A. As a result of the analysis, which is incomplete at

[54]

the moment, but on the basis of almost — over 2,000 suggestions received; taking approximately 300 of them that seemed to be implementable. We have documented over $55,000 in actual savings and are projecting hopefully over $125,000 in savings.

CROSS EXAMINATION

Q. (By Mrs. Baum) You say that signs were posted and you mentioned payroll stuffers. Would you please explain what you mean by payroll stuffers, first of all?

A. The week before the program was kicked off, there was a payday and a half sheet of paper was inserted with each paycheck.

Q. These signs, where wer they posted?

A. To my knowledge they were posted in working areas —

Q. Specific areas?

A. Specifics?

Q. Yes.

A. They were posted in locker rooms, they were posted in the cafeteria, they were posted in corridor ways of employee work areas, and they were put in conference rooms and they were put in many offices and placed in the Curstine Hall building. And I would say there were some 40 or 50 locations.

Q. Were there any signs distributed or posted on patient areas on the floors near nursing stations?

[55]

A. The initial week the Teaser Week that I referred to, to my knowledge the posters on patient floors were restricted to the rear rooms of a nursing station or the nursing conference rooms.

There was nothing in the corridors for the patients and the visitors—

Q. That is the initial week?
A. That is the initial week. That is which week we were working under the TEASE of BAD, not explaining it.

When the program was announced and we got into then what BAD stood for, the various displays were prominently displayed in placing stations and corridors.
Q. Were there posters all the same size? Did they vary in size?
A. They varied in size.
Q. What was the smallest size?
A. The smallest was a stand up figure, approximately three inches high.
Q. And what was the largest?
A. Probably a poster that was approximately three foot by four foot—then there was a banner that was six by three.
Q. You mentioned locker rooms, were they posted in all the locker rooms?
A. Not in all locker rooms, in some of the locker rooms.

[56]

MR. HIATT: I have a couple of questions.
Q. (By Mr. Hiatt) You mentioned that that first Teaser Week, when the campaign had not yet been explained that you did not post posters or signs or whatever in patient areas. What was the reason for that?
A. It was our intent that the word BAD not fully explained might not be appropriately received.
Q. And in what way?
A. Just the connotation of what BAD would—what is the word BAD mean in the hospital.
Q. And wouldn't that be true for employees also?
A. It is our opinion no.

Q. Well, what is the difference in terms of why you choose to put them in employee areas that week and not in patient areas?
A. It is our intent in the program to reach employees, not the patients.
Q. But you weren't afraid of the connotations in terms of employees for that first teaser week?
A. The word connotation or afraid didn't enter into the decision.

MR. CHANDLER: I think we—go ahead, I'm sorry.
Q. (By Mr. Hiatt) I'm sorry?
A. The words afraid or connotation were not part of the decision.

[57]

Q. For employees?
A. We were approaching the program to tease employees for participation, therefore our efforts were directed to where employees would be. And, therefore, we would be able to tease them.
Q. But the connotations did enter into it in terms of keeping it out of the patient areas that first week?
A. Right.
Q. Just one other question. Are you aware of the fact that the BAD poster that was taped over the vending machines in the coffee shop, taped to the wall?
A. You mean literally over the machines?
Q. It might not have been right over the machines, but in the vending machine area? In the coffee shop or anywhere on the wall of the coffee shop, are you acquainted with that particular poster?
A. There were many posters put up. I don't know which particular—
Q. Are you aware of any BAD posters that were taped to the wall in the coffee shop?

A. In the second week I believe.
Q. You are aware?
A. I am aware that there were posters in the cafeteria area.
Q. Was that an official poster, that wasn't unilaterally

[58]

posted by some employee who put it up?
A. Not knowing exactly which poster and which day or which time you are talking about; I—
Q. Did you ever authorize anyone to tape a BAD poster to the wall in the coffee shop?
A. Yes, I did.

. . .

MRS. BAUM: Your Honor, the parties have agreed previously that the following stipulation should be entered.

That employees do not live at the hospital and they must commute. There are no residents on the premises today although there are sleeping rooms for house staff. I believe residents and interns.

MS. CRONIN: Right.

MRS. BAUM: We have also agreed that there are approximately [2200] employees excluding the house staff positions, and the attending physicians and students, excluding Harvard employees from that.

MR. CHANDLER: There is an additional stipulation, I think the first day of hearing we didn't have an answer as to the midnight supper that is held in the cafeteria be-

[59]

tween the hours of 10:30 and 12 p.m. This midnight supper is primarily for house staff, although any employee may use the cafeteria during that time. The average use

during this midnight supper is between 7 and 30 employees.

JUDGE PETERSON: Is that agreeable?

MRS. BAUM: Yes.

JUDGE PETERSON: All right.

MRS. BAUM: There was I believe, a further stipulation about the parking at the parking lot, which is some three blocks away from the Hospital. This is a parking lot which is used by the several Harvard hospitals in the area, and there is a shuttle bus which operates at intervals to transport employees to the hospital. It makes stops along the way at the various hospitals where employees embark and employees are also transported to the parking lot by the shuttle buses. These employees work at the several hospitals I believe as stated.

[60]

JAMES BRACE

was called as a witness, by and on behalf of the Respondent and, having been first duly sworn, was examined and testified as follows:

. . .

DIRECT EXAMINATION

Q. (By Mr. Chandler) Mr. Brace, are you employed by Beth Israel Hospital?
A. Yes.
Q. And what is your position?
A. Assistant administrator of housekeeping.
Q. And are you familiar with the locker rooms that are available throughout the hospital for employees and non-employees?
A. Yes, I am.

[61]

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MR. CHANDLER: The Respondent in this matter does not feel, and it will be a matter of argument, that the question of access of employees, alternative access to employees is a consideration in this matter. But we will present a stiplation that we have prepard jointly and argue as to relevance, in the briefs.

[62]

The parties stipulate that there are certain non-working areas, employee non-working areas, certain locker rooms in which any employee may enter and engage in solicitation or distribution during his or her non-working time.

There are other areas that are locker rooms, also non-working areas, that for reasons of security are not open to solicitation or distribution by all hospital employees, but are available for distribution and solicitation by employees who are assigned lockers in such areas.

There are other locker room areas that patients and general public have access to, and some of these are in corridors, others are separate locker rooms and in these areas no distribution or solicitation is permitted.

There are lockers in certain work areas, such as conference rooms and no distribution or solicitation is permitted in these areas.

I think we can present testimony as to which or where these lockers are and how many and so forth through the witness that is now on the stand.

MR. MARROW: An essence to add, there are four categories that have been defined by Mr. Chandler, and he will illicit testimony.

JUDGE PETERSON: Very well.

Q. (By Mr. Chandler) Mr. Brace, I show you this five page document that is identified as Joint Exhibit No. 31,

[63]

would you be able to indicate for the record what this document is first of all?

A. This is a list of all the locker rooms for employees that we have knowledge of or lockers, excuse me, lockers.

Q. So these are all the lockers that are in the Beth Israel hospital?

A. Placed in various areas for employees.

Q. And you have broken down the lockers by numbers and location and by use?

A. Correct.

Q. Would you be prepared to indicate, for the record, which lockers or which locker areas on the exhibit are available for any employee to engage in solicitation and distribution?

A. How do you mean?

Q. We have sitpulated as to four subject categories of lockers. One of them, certain locker areas may be utilized by any employee whether they have a locker in that area or not. They may utilize that area for engaging in solicitation or distribution.

Would you be able to indicate what areas those are?

A. Yes.

Q. Wouldyou please?

A. Locker Room SD07, numbered Locker Room 1 it is in the south basement—

[64]

Q. I'm sorry. You are on page one of this exhibit?

A. Yes.

The bottom, the last entry.

There is 114 lockers in there.

Q. And that is an area in which any employee may engage in solicitation or distribution?

A. It is a non-work area.

Q. Could you continue through the exhibit—

A. And on the next page, you have 159 lockers, and it is located in the South basement, again, Locker Room No. 2.

Next you have 249 lockers located in the south basement and it is numbered—Locker Room No. 3.

Then we have 85 lockers located in the south basement SBO9, Locker Room No. 4.

Q. Are there any locker room facilities listed on the third page titled miscellaneous lockers, which are available to any employee for the purposes of solicitation and distribution?

A. Not if we follow the rules that we set down for locker rooms, 1, 2, 3, and 4.

Q. Okay.

And on the fourth page, same question.

A. Same answer.

Q. And lockers that are confined to the nursing stations,

[65]

Page five of the exhibit?

A. That would be the same.

Q. The answer is no?

A. Right.

Q. Now going back to the beginning of the exhibit, could you review the document and indicate what areas are employee only locker rooms that for reasons of security or other reasons are not open to colitidation to all of the employees of the hospital, but are open to colicitation and distribution for—by employees who are assigned to that area, during their non-working time?

A. I would think the first locker, EDO1. NLB 36, LB27,

SV01, R3 54, the X-ray areas, SV 321, SV 325, SV 3281, E401, N507, N516, S531, and that's all.

MR. CHANDLER: The parties have agreed to submit this exhibit, Joint Exhibit 31, after marking it appropriately for the four categories, as stipulated to. That is rather than take the time at this time through a witness. We will present it in that fashion. . . .

[67]

MR. CHANDLER: I have what has been marked for identification as Joint Exhibit 31, and all parties have agreed to submit this Joint Exhibit with the categories 1, 2, 3, 4, as described in earlier testimony, designated as to each locker area or facility.

MR. CHANDLER: There are two other stipulations that I think we can enter into at this time.

One involves the hospital's position as to giving this union or any union a list of employees names and addresses. And the hospital's position is that they have not and will not give the union a list of names and addresses, as we feel that they are not entitled to it, unless there should be an election and, pursuant to an excellsior type situation, when the Board orders that we give them such a list.

The other stipulation is that the hospital has never attempted to bar either outside union organizers or employee organizers from soliciting or distributing litera-

[68]

ture off the hospital premises and public areas.

JUDGE PETERSON: Is that agreeable?

MRS. BAUM: Yes.

. . .

ROBERT HESS

was called upon, as a witness, by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

. . .

DIRECT EXAMINATION

Q. (By Mrs. Baum) How long have you worked at Beth Israel Hospital?

A. Some months over six years.

Q. What is your job there?

A. I am a respiratory therapist.

Q. I would like to direct your attention to the year 1973. Do you recall any posters that were posted in the cafeteria

[69]

soliciting funds?

A. I do.

Q. What were these posters?

A. The posters were soliciting funds for the Israel Emergency Fund.

Q. Do you recall what they said?

A. As best I recall, they were hand lettered posters taped to the walls, both in the cafeteria proper, north side, and the entrance to the north side line, that said, Give to the Israel Emergency Fund, contact the develppment office and had an extension number, I believe it was 691, although I am not positive about that.

Q. Do you remember approximately when this was, what time of year, the date or month?

A. It was around Yom Kippur, it was simultaneous with the war.

Q. When is that?

A. Yom Kippur, if I recall correctly is in the fall.

[71]

ANN SCHUNIOR

was called upon, as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

. . .

DIRECT EXAMINATION

Q. (By Mrs. Baum) How long have you worked at Beth Israel Hospital?

A. A little over a year.

Q. What do you do there?

A. I am a research technician in the Department of Medicine.

Q. I would like to direct your attention to October 25, the date you were distributing literature, in 1974, was this work time?

A. No, I was on my lunch hour.

Q. In your year and a quarter, how often have you gone to the employee locker rooms, if ever?

A. Since the union election last April, before that I wasn't in them at all—since the election I am probably in the locker rooms once a week, once every two weeks.

Q. For what purpose?

A. It's the only place we can legally distribute as we see it, and talk to employees about the union, and that is what I do there.

[72]

Q. Are there any bulletin boards in these locker rooms?

A. I have been in two women's locker rooms, the two that are mentioned in the last exhibit, that are in the

basement of the south building, I think it is South Basement 16 and 18.

. . .

Q. (By Mrs. Baum) Will you continue please?
A. The larger of the two locker rooms, South building 18 has no bulletinboards. There is one bulletin board in Basement 16.
Q. On all your many trips to the locker rooms, have you seen many hospital—let me rephrase that.

And, has the hospital posted any notices or any literature in these locker rooms?

[73]

A. I know of nothing posted in Room 18.

Room 16 has nothing on the bulletin board. It has—there is a door that seperates [sic] the sort of a lounge locker room area from the restroom, and it has a door. And that door has a bulletin board—no, I'm sorry. That door has a poster with a very I think out of date sign on it, that is titled something like Notice of hours for women and minors.
Q. Let's go back upstairs to the cafeteria. Can you tell us how, if it possible to distinguish between visitors and—let me strike that.

How often do you eat in the cafeteria?
A. I about—often like three to four days a week eat lunch there. Maybe one or two mornings a week I will sit down for five or ten minutes and have a cup of coffee with someone before work.
Q. What other times might you be in the cafeteria?
A. I go through the cafeteria—other than that at least two times a day and often a dozen times a day. I work in the Landy Building, which is the building Ms. Cronin referred to as the research building, that you get to out the back door of the cafeteria.

That is the easiest access in and out so I come to work through the cafeteria and I leave through the cafeteria and any time I want to go then to the office of the de-

[74]

partment of medicine, to the Xerox machines, to the library, to the personnel office; I come and go through the cafeteria.
Q. How can you tell the difference between employees and other people, visitors, patients and the other people?
A. The other people.

There are a lot of differences. Employees, many of them wear uniforms. All of them are supposed to wear name tags. All employees are issued name tags, and almost all employees do wear name tags.

MR. CHANDLER: I'm sorry, I didn't hear that.

THE WITNESS: Name tags, employees have name tags.

MR. CHANDLER: Was that what you said?

THE WITNESS: We are issued name tags, when we do go there. And almost all of the employees do wear them, besides wearing uniforms.

After you work there a while and eat there a while, you recognize faces. There are people that you see every day.

Visitors on the other hand, have none of the identifying things about them, they are people that you have never seen before, that don't wear name tags, and it is hard to explain, but they generally look lost. They look out of place, they don't know where things are in the cafeteria line, they hold up theline. They are eating with themselves as opposed to a group of people that you are—know are employees.

[75]

Q. Now, how can you tell patients?
A. There are two kinds of patients. There are the in-patients and they generally look like patients. Occasionally a patient comes down obviously in bedclothes, occasionally, with IV tubes attached. Other patients wear wrist bands. Those patients you can generally tell.

There are occasionally I guess out patients who come into the visiting clinics. There would really be no way of telling those patients from a visitor.
Q. How do you distribute your literature? Or, how did you?
A. For which I got my warning?
Q. Yes.
A. I was going—I was in the cafeteria, both the north side and the south side going from table to table, giving them out. I generally asked people as I gave them out if they were people that were in uniforms—if I knew them and I thought they were employees, I asked if they would like the copy of AS We See It. I gave it to them if they said they would like one. If I didn't know them, and thought they might be visitors, I asked if they were employees, and explained that I was passing out literature for employees. There was only a few people I was in doubt about, and those I checked on.
Q. And that same cafeteria, we have discussed a table

[76]

that is directly in front of the nonofficial bulletin board. As best you recall, how long has that table been there?
A. As long as I have worked there.

I started January 7th, 1974. So that is over a year, but I remember it from—it has been there as long as I have been there.

Q. Have you ever seen or anybody put literature on that table?
A. I did once. I don't know who it was, except that they looked like an employee. It was someone in a uniform.
Q. And what kind of literature did they put down?
A. It was a stack of Reader's Digest Condensed Books. It was soliciting for Reader's Digest something.
Q. When was that?
A. January or February of this year. Probably late January.
Q. Do you recall what time of day this was? Were you at lunch or were you walking through?
A. I am really not sure, I recall it was either lunch time or probably breakfast time, because I knew there were other people around, but I am really not sure what time of day.
Q. What happens to literature that is left on that table?
A. Employees take it.
Q. Have you seen employees take it?
A. Oh, yes.
Q. Can you recall any specific time when you saw an employee taking some literature? Or, when you yourself took literature?

[77]

A. I have certainly taken literature, and yes I do remember people going in and picking up the Kodak mail fliers.

[81]

Q. (By Mr. HIatt) The question, Ann, was could you give some examples of types of conversations which you have been involved in or overheard at the dining table in the hall?

A. I often eat with technicians, since I am a technician and we talk about our work at lunch, along with all the other things that we talk about. I can think of a couple of issues that might be relevant.

One is the discussion of strepococcus epidemics in the hospital, that the rate at which strep passes from patient to patient, that people being infected in the hospital is very high, and I gather in epidemic proportions.

Another thing we talk about very frequently, and endlessly is understaffing, and often spend our lunches complaining about understaffing problems.

Specifically I have heard conversation from people in the chemistry lab saying that on days in which they are badly understaffed, they don't always have time to repeat

[82]

marginal tests that they there do a test, and there will be some question as to whether the test was performed quite right or the controls were quite right. But, then unfortunately, they—there just isn't time to do the test over again, as it ideally should be done.

Q. Okay.

One more question. Has the Hospital ever issued to you in the form of written or verbal notices, an appeal or rule to not discuss those subjects which you have just mentioned?

A. No. There have been no rules, no mention of it.

. . .

CROSS EXAMINATION

Q. (By Mr. Chandler) You have been employed for how long at Beth Israel?

A. Over a year, I started January 7th, '74.

Q. And I assume that doctors and other employees of the hospital would be as adept as you are in determining who visitors and patients and employees were in the cafeteria, is that right?

MRS. BAUM: Objection.

Miss Schunior, she can't testify for other people.

JUDGE PETERSON: Sustained.

Q. (By Mr. Chandler) Are you familiar with the brochure that is put out by the hospital and given to patients entitled, Your Rights as a Patient, at Beth Israel Hospital?

[83]

A. I have seen it. I probably glanced through it or at it six months ago.

MR. CHANDLER: I would like this marked as Respondent's Exhibit No. 1.

(The document above referred to was marked Respondent's Exhibit No. 1 for identification.)

Q. (By Mr. Chandler) This is a leaflet entitled, Your Rights as a Patient at Beth Israel Hospital, Boston. Now, you say you have glanced through it, how did you happen to get a hold of a copy of that?

A. It is given out in the hospital lobby, of the outpatient department on the first floor of the Rab Buidling and I picked up a copy from there.

Q. Are you aware that this was distributed to all employees with the general director's newsletters on several occasions in the past two years?

A. No. I was not aware of it.

Q. I have bracketted Number 4, on the Exhibit, could you read from that please?

A. "You have the right to privacy. In the clinics, you should be able to talk with your doctor, nurse, other health

worker or an administrative officer in private, and know that the information you supply will not be overheard nor given to others without your permission."

[85]

Q. (By Mr. Chandelr) Directing your attention to JOint Exhibit No. 1, page 23, this is the working together employee handbook. Could you read please under confidential information?

A. "Information about patients and their illnesses is private and it is the obligation of every member of the hospital family to keep it strictly confidential."

Q. Are you aware, Miss Schunior, that there are out patients in there and psychiatric patients that use the cafeteria for meals?

A. I am certainly aware that there are out patients that use it for meals. I did not become aware until about a week ago that psychiatric patients used it.

Q. When you were issued a warning for distributing material in the cafeteria, what were you distributing?

A. I was distributing As we see it.

Q. Do you know what edition of As We See It, it was?

A. October.

[86]

ROBERT HESS

was recalled as a witness, by and on behalf of the General Counsel and, having been previously sworn, was examined further and testified as follows:

DIRECT EXAMINATION

Q. (By Mrs. Baum) Mr. Hess, just one small final question, what sort of literature do you recall receiving with your checks?

A. Generally there is a newsletter from the General Director. Occasionally in the past there have been inclusions of various sorts. For a while we were getting ads from Garber Travel to take trips to Switzerland or Disneyland.

Q. When was that, do you recall?

A. It was several years ago, I believe it stopped roughly a year and a half ago.

Q. How you—how do you remember these particular trips?

A. I found it somewhat irritating to get a paycheck then, and then get travel ads for more than the paycheck totaled. In one case there were six of them distributed with the paycheck.

[87]

ANNE CRONIN

was recalled as a witness by and on behalf of the Respondent, and having been first duly sworn, was examined and testified further as follows:

DIRECT EXAMINATION

Q. (By Mr. Chandler) Ms Cronin, there was tesitmony as to the Israel Emergency Fund and the efforts that occured in October '73 with respect to that, could you tell us how that came about?

A. The Hospital recognizes two drives a year, and that has been I believe stipulated to. One is the United Way and the other is the combined Jewish Philantrophies Organization Drive.

Q. Excuse me, I have heard both United Fund and United Way.

A. All right. I think it is the United Way. A couple of years ago it used to be the United Fund. It is a community

[88]

chest drive.

CJP drive generally takes place in Feburary, March and sometimes into April of each year. Tight after the Yom Kippur war, which I believe was in October that particular year, the CJP asked its usual groups of industries and hospitals, et cetera who participate in their drive to have the march or Feburary drive moved up to the fall into that time, and to ask those people who normally did contribute in the spring to this drive. Since the money was needed at that time, to advance the drive by five or six months. It had a special name. Each year I think they have a special subname to it, and they have a special name.

Those people who were willing to give their money in October rather than in March, the following March, were asked to do so then; and they should feel under no obligation to contribute in the spring. That was the money that was considered for that drive.

Q. We have in evidence, Respondent's Exhibit 1, which involves the patients' rights, that leaflet. Could you describe for us what kind of program it is, how did this orignate?

A. The patients' rights brochure was developed at Beth israel Hospital, and it was the first hospital in the nation that had such a brochure.

Now, I think you will find that many hospitals do. In fact the American Hospitals Association urged its member

[89]

hospitals to do this kind of thing. And ours was really used as a model.

It was developed because the staff of Beth Israel, the Administrative Staff, the medical staff and so forth, truly believe that patients had rights as well as everybody else

in this world. And therefore, and the patients especially needed to know those rights. Because when they come into the hospital it is a foriegn kind of experience for them.

In addition, we felt it was important that every employee in the hospital and every volunteer understood the patient had rights and to be very well aware of those rights.

So that was the purpose for developing it.

Q. Were there employees made aware of this leaflet?

A. Yes.

I am not really sure about the total distribution of it, but I do know that every new employee who comes to the orientation, the week they start work at Beth Israel is given a copy. And Doctor Rabkin talks to them briefly about it. It has been mentioned in inumerable communications from the director. It has been distributed to all of the areas of the hospital and, hopefully, we like to feel that all our patients and all our employees and all our volunteers and all our visiting staff are totally aware of it.

[90]

Q. (By Mr. Chandler) Ms. Cronin, there has been a survey that has been introduced into evidence as—about the use of the cafeteria, and one of the categories of the people that use the cafeteria are patients. Wuld you indicate what patients may use the cafeteria and when and under what circumstances?

A. The patients who are normally classified as out patients, come in either to the biop clinics or out patient department, or may come in in an ambulatory basis too, to radiology or any of them which there are ambulatory patients who often use the cafeteria, either prior to going

[91]

to the clinic or at lunch time, or after going to the clinic, like at night. That would be one category of patients who would be strictly out patient.

We have another category of patients that are in 2 East, which is the psychiatric inpatient area of the hospital. And these patients are routinely used the cafeteria for the breakfast period in the morning. I don't know for certain whether any of the inpatients, those who are non-ambulatory in the hospital would really come down or not. I suspect they could, but I doubt they would since meals are served on the floors.

Q. Do the psychiatric patients use the cafeteria for meals, other than breakfast?

A. I don't think so, because the meals are served, the other two meals are served in the 2 East area.

Q. Can patients who are ambulatory make arrangements to eat in the cafeteria, and not be chargd for the meals?

A. I don't think so.

Q. When psychiatric patients from ward 2 East come in, how do they come in? Do they come in as a group, come in individually?

A. No, they come in individually. They come in any way they want. They might come into the cafeteria with another one or by themselves.

Q. Would there be an attendant present?

[92]

A. As I understand it, if a patient is in his first or second day in the unit, and the doctor in charge of that particular patient might have some questions about this individual. He would perhaps recommend that the patient

not go off the unit or that if he did go to the cafeteria somebody might lead him there.

After that period of time, he would either go with his own or he would be permitted to leave the unit.

Q. How are these patients from 2 East dressed when they come into the cafeteria?

A. In their own clothes.

Q. Street clothes?

A. Yes.

Q. To your knowledge do they generally eat together or alone?

A. I have been told that it is purely up to them, most of them eat alone. But occasionlly one might join another it they know one another. That's what I ahve been told.

Q. Now the out patients that you said use the cafeteria, do they come in at any particular time during the day?

A. I think a number of them come in at breakfast time, perhaps not a large number, but a number of them might come in at breakfast time or into the coffee shop before the clinic start. A larger number would be in the cafeteria or the coffee shop, after the morning clinics or before

[93]

and after the morning clinics or before an afternoon clinics. And, then others might be in the cafeteria in the evening — in the evening meal if they have finished their clinic visit in the afternoon and had wanted to stay on or—we do have some evening clinics.

Q. How often do you eat in the cafeteria?

A. It depends on my own work load. If I can get away for lunch, I will go over to the cafeteria. Oftentimes I eat at my desk, occasionally I have meetings outside. It might be 25 percent of the time.

Q. And how long have you been personnel director at Beth Israel Hospital?
A. Nine years and two months.
Q. Now, when you eat in the cafeteria, are you able to distinguish employees from non-employees?
A. Some I can. Those that I know that have been over to personnel. A large number of them I cannot distinguish whether they are Beth Israel employees or employees from other hospitals, students on rotation, any number of people use the cafeteria, volunteers.
Q. I believe Miss Schunior testified that in her observation almost all employees wear hospital name tags. In your experience is this the case?
A. I would like to think it was. I am afraid that is a constant source of concern of many of our department heads,

[94]

who certainly urge it. Some department heads insist upon this as a rule, and I think a large number of employees in the service departments perhaps wear them more frequently than some of us who have them in our desk and forget to put it on occasionally.

. . .

MR. CHANDLER: Respondent's 3(a) is a Dear Doctor letter dated July 29, 1971. Respondent's 3(b) is a newsletter from the General Director dted September 30, 1971. Respondent 3(c) is a Dear Doctor letter dated July 19, 1973. And, Respondent's 3(d) is a Dear Doctor letter dated October 17, 1974.
Q. (By Mr. Chandler) Directing your attention to Respondent's 3(a) through 3(d) for identification, are there references in each of these documents as to conversations of employees, dealing with patient matters and the confidentiality of such discussions?
A. Yes.

[95]

Q. (By Mr. Chandler) Other than the newsletters and Dear Doctor letters and the patient rights brochure, are there any other communications that are made to employees that deal with this confidentiality question?
A. Yes.
Q. Could you elaborate for us please?
A. In the original interview from many departments, for many jobs, I know this is handled either in the personnel department or in the interviewing—hiring department. It is also discussed at orientation of, I believe at the time of the patient's rights; and I think has probably been the subject of many discussions—in fact it has been, the subject of many discussions which the General Director has had with its administrative staff, calling our attention to some problems in this nature. And asking us to make sure that all of our employees, including all of the medical staff, are aware of this problem.
Q. With respect to this survey of the usage of the cafeteria, I notice that one of the categories lumps together

[96]

employees of Beth Israel and Harvard employees, could you indicate for the record whether Harvard employees are Beth Israel employees?
A. The distinction there is the Beth Israel employees receive their salary from the Beth Israel Hospital, and come under the policies and procedures and benefits, et cetera of the hospital.

There are certain number of employees who work for the Harvard Medical Schol, who receive their salary check from Harvard Medical School, and who come under the

personnel policies, benefits, et cetera, of the Harvard Medical School.

However, they work physically in the Beth Israel Hospital, and this happens in other Harvard teaching hospitals.

Q. And what types of departments?

A. They are generally in the research department, the department of medicine, the department of surgery, maybe Obs-Gyn, some anthropology maybe.

Q. Do they work as clerical employees too?

A. There are some clerical employees.

Q. How many shifts are there at the hospital?

A. There are three basic patient care shifts. That is those people who work with the patients in general, in the nursing and so forth, and so on. We have a three shift operation, generally 7 to 3:30. 3:30 to 11, and 11 to 7 or 11:30 to 7.

[97]

In other departments—there are many departments who have one shift, 8:30 to 5, or 8 to 4:30, and there are many [service] departments where they have two shifts, a day shift and an evening shift. And I think dietary workers would be like that.

There is a variety of—it is a 24 hour a day operation where patient care is involved, so there is a variety of shifts.

CROSS EXAMINATION

Q. (By Mr. Marrow) I notice, Mrs. Cronin, that the hospital is a constituent agency of the Combined Jewish Philantrophies?

A. That means that the hospital is one of those agencies that receive allocations from the CJP.

Q. So then in fact the hospital benefits either directly or indirectly from the funds that are collected by CJP?

A. Yes.

Q. Is this also true in respect to the United Way?

A. No.

Q. So that the hospital, it is fair to say, has a relation

[98]

or direct interest in funds that are collected by CJP?

A. Yes.

[100]

Q. Now, there was some testimony with respect to the psychiatric patients that dine in the cafeteria, or dining room. Do you know how many psychiatric patients are involved in that?

A. I believe it is a 14 bed unit, so there could be anywhere from hopefully 14 each, but our bed capacity isn't always up at that. I suspect the average may be around 12, or somewhere in that area.

Q. Now, do these people wear ordinary dress?

A. Yes.

Q. Do they have any identification bracelets, such as outpatients would wear?

A. I would assume they may have the bracelet, which would be usually under their sleeve. I think they get the same bracelet as any inpatient, individual does.

Q. Do they take all their meals at the cafeteria?

A. No.

Q. Just the breakfast?

A. Yes.

[104]

REDIRECT EXAMINATION

Q. (By Mr. chandler) YOu testified that you assumed the psychiatric patients would wear bracelets, do you know? Of your knowledge, do they wear patient identification bracelets?

A. I believe that anybody who is admitted to the hospital as an inpatient does wear an identification, a little thin strip. I see no reason why they would be different. I have to check it out, but I believe they do.

Q. Are there psychiatric patients that may come into the ward on a particular morning and not stay overnight in the hospital?

A. There are psychiatric outpatients, we have a large psychiatric department in which we have a very large number of patients who come in for treatment. They are the ambulatory patients that come in and they, like any of the other ambulatory patients, in fact I know they do use the cafeteria.

[105]

Q. Do they wear identification bracelets?

A. An outpatient individual does not wear an identification bracelet.

[106]

RECROSS EXAMINATION

Q. (By Mr. HIatt) Are you familiar with the practice of four or five surgeons occasionally with students who meet in the cafeteria during the breakfast hour once or twice a week and discuss their common patients and who is going to be doing what with which patient for the day?

MR. CHANDLER: Objection.

THE WITNESS: No, I am not.

Q. (By Mr. Hiatt) Do you know that that practice does not take place?

A. I have never heard of it.

. . .

MR. HIATT: I would like to recall Robert Hess for one short question.

JUDGE PETERSON: You can stay right there, ask him from there.

MR. HIATT: You heard the question that was just put to Ms. Cronin, concerning the practice of surgeons?

[107]

THE WITNESS: I did.

MR. HIATT: Are you familiar with that practice?

MR. CHANDLER: Objection.

JUDGE PETERSON: He may answer, go ahead.

THE WITNESS: I have seen it on a number of occasions.

Joint Exhibit 1.

Employees Handbook.

CREDO OF EMPLOYEE RELATIONS

The Beth Israel Hospital above all recognizes the importance of the patient and the dignity of the individual employee.

We believe the primary obligation of Beth Israel Hospital is to make available to the community the best possible medical care.

We believe each employee, directly or indirectly, plays a vital role in patient care.

. . .

We believe that hospital employees can best fulfill their special responsibilities to patients by demonstrating courtesy, cooperation and tact at all times.

. . .

We believe that the concerted effort of the Hospital and all its employees can achieve a harmony of high quality patient care, with an environment where all are treated fairly, with consideration and dignity.

. . .

Facts About Beth Israel Hospital.

Beth Israel Hospital began as a non-sectarian community hospital over fifty years ago. From its first location in Roxbury, the Hospital moved to Brookline Avenue in 1928. It has become a well-known teaching hospital affiliated with Harvard Medical School and a world leader in the care of patients and in teaching, research and community service.

A "teaching" or "university" hospital is as concerned about patient care as is a "community" hospital. In ad-

dition, its interest in the patient's health extends well beyond its own walls. For example, Beth Israel Hospital is involved in several programs which seek means to deliver medical care more effectively and economically to the entire community. The reason we are involved in teaching is to insure that physicians, nurses and other health workers are well trained and capable. The reason we are involved in research is to insure that patients have the benefit of the very best that the science of medicine can offer.

Stated simply, Beth Israel Hospital is "concerned with today's illness and tomorrow's health." At the same time, we do not forget the art of medicine and the small and large comforts that can ease the difficult experience of being ill. In these endeavors all the employees of the Hospital find a common purpose and pride.

. . .

LUNCH AND RELIEF PERIODS

All departments observe a lunch period of thirty minutes. The lunch period may, if necessary, be scheduled on a staggered basis to provide better service. Your supervisor is directly responsible for assigning your lunch period.

You may take a ten minute relief or "coffee break" period in the morning and in the afternoon. However, the exact time must have your supervisor's approval.

Cafeteria and Coffee Shop

A modern Cafeteria is provided for all employees where nutritious, well prepared meals may be purchased at reasonable prices.

The Coffee Shop is open 24 hours per day to provide light refreshments for personnel, house staff and guests. It is located on the second floor of the South Building.

Appearance and Conduct

You are an important part of the Hospital's public relations. To patients and visitors alike you are Beth Israel Hospital; your appearance and conduct will influence their opinions of the Hospital. The very nature of our work requires cleanliness, neatness and good health. Whether you are wearing street clothes or a uniform you should present, both in clothes and make up, a well-groomed, healthy, cheerful and business-like appearance.

. . .

Hospital Rules

The Hospital wants to recognize good performance, and to let employees and supervisors know where they stand.

As you know, employees are encouraged to discuss with their supervisors any questions or problems they may have. At times questions arise as to what is a violation or infraction and what is not. To clarify questions of this nature, the following list of hospital rules has been developed.

IT IS IN THE INTEREST OF ALL OF US THAT EACH DEPARTMENT IN THE HOSPITAL OPERATES SMOOTHLY, EFFECTIVELY AND SAFELY. OBSERVING THESE REGULATIONS WILL HELP ATTAIN THIS OBJECTIVE.

The following practices are specifically forbidden and may result in the immediate dismissal of any employees:

1. Improper conduct toward patients or employees and interfering with performing their assigned work.
2. Willful insubordination.
3. Coming to work under the influence of liquor, bringing liquor into the Hospital, or using alcoholic beverages during working hours.

4. Theft or deliberate destruction of Hospital or personal property.
5. Use or possession of narcotics or barbiturates, etc., which have not been prescribed for medical reasons.
6. Fighting, profanity, gambling or other disorderly conduct on Hospital premises.

Committing the following acts may be considered good and sufficient cause for dismissal. It is the general policy of the Hospital to give warning prior to dismissal.

7. Repeated absence or tardiness without reason satisfactory to the Hospital.
8. Failing to perform the required duties of the job as prescribed.
9. Leaving the work station or department during working hours without prior permission of the immediate supervisor.
10. Sleeping on duty.
11. Removing from Beth Israel Hospital any Hospital property without the express permission of the responsible Department Head.
12. [See revised rule under notes.]
13. [See revised rule under notes.]
14. Smoking where "NO SMOKING" signs exist, or in any patient-care areas, including nursing stations.
15. Failing to wear prescribed safety equipment or to perform duties in a designated safe manner.
16. Failing to comply with Hospital health, fire, security or traffic regulations.
17. Loitering on the premises before and after working hours.

18. Entering at any time without permission such restricted areas as Storeroom, Pharmacy, Operating Room, Delivery Suite, etc.

Notes

No Soliciting.

There is to be no soliciting of the general public (patients, visitors) on Hospital property. Soliciting and the distribution of literature to B.I. employees may be done by other B.I. employees, when neither individual is on his or her working time, in employee-only areas — employee locker rooms and certain adjacent rest rooms. Elsewhere within the Hospital, including patient-care and all other work areas, and areas open to the public such as the lobbies, cafeteria and coffee shop, corridors, elevators, gift shop, etc., there is to be no solicitation nor distribution of literature.

Solicitation or distribution of literature on Hospital property by *non-employees* is expressly prohibited at all times.

Consistent with our long-standing practices, the annual appeal campaigns of the United Fund and of the Combined Jewish Philanthropies for voluntary charitable gifts will continue to be carried out by the Hospital.

Joint Exhibit 2.

Newsletter from the General Director — 23 July 1970.

. . .

Notices and posters listing activities not officially sponsored by the Hospital may be placed only on the non-official bulletin board in the cafeteria. In addition, to post such notices on the Personnel Department bulletin board, prior approval of the Personnel Department is required. Similarly, approval of the Departments of Med-

icine, Surgery, etc., is required for posting of such notices on their bulletin boards. Notices and posters may not be put up on any walls, windows, etc. Any notice which suggests to the patient or public a faltering of our intention or capacity to provide the best care to patients is unacceptable and will be removed.

Distribution of communications through the Hospital mail room is limited to official communications that relate to the clinical, teaching, research and administrative functions of the Hospital.

Petitions, discussions, etc., amongst Hospital personnel should be carried out only on a person to person basis at coffee breaks, mealtimes or after the working hours of all those involved. This statement should not be interpreted as forbidding ordinary conversations, discussions, etc., which do not interfere with work or the rights of others. Direct confrontation and solicitation of the public, staff and employees through leaflets, ets., must not be done on Hospital property.

Under no circumstances must there be any form of coercion applied to co-workers, or to patients and visitors. Patients and visitors have their own overriding personal concerns and they should not be requested to become involved in those of others. Our experience has shown that many patients do become upset when those caring for them display political emblems. Consideration of patients, therefore, indicates that armbands, pins, etc., should not be displayed on patient units.

The Hospital reserves the right to modify these guidelines.

/s/ Mitchell T. Rabkin, M.D.
Mitchell T. Rabkin, M.D.
General Director

Joint Exhibit 3.

Special Newsletter from the General Director —
16 January 1973.

Our primary task is to provide the sick with care of the highest quality. That care depends upon people, you and me. At Beth Israel, we seek to enlist and retain qualified, skilled and thoughtful employees by providing wages, benefits and working conditions which insure your economic security and dignity. Our philosophy has long been stated as the Credo of Employee Relations in our employee handbook, "Working Together." Just as we are concerned with the rights of patients receiving care, we are concerned with the conditions of work for those who provide that care at Beth Israel Hospital.

We all know that union organizers have been urging employees to have a union represent them. I believe that employees have the right to decide whether or not to join a union, and that organizers have a right to speak to employees under certain conditions, but I am disturbed to find these organizers now purposely interfering with the service being rendered by our employees. The Hospital has tried politely to have the organizers confine their activities to non-working time and non-working areas of the Hospital. However, these outsiders persist in entering working and patient care areas and distracting employees at work. This not only violates our No Soliciting rule; it is trespassing!

. . .

I believe that a union has no place at Beth Israel Hospital. The disruptive activities of the union organizers demonstrate their lack of true concern for both B.I. patients and employees. The union knows that employees and administration of Beth Israel Hospital together have built

a solid record of fair treatment and mutual respect. Why then should they be so interested in us? Although they will deny it, the union's primary concern today is the thousands of dollars they will gain from employees' dues, dollars to come directly out of your pockets.

Joint Exhibit 4.

25 January 1973

Dear Doctor:

It is common knowledge that hospital workers have recently been under pressure by union organizers urging employees to have a union represent them. We believe that a union has no place at Beth Israel Hospital because employees and administration of Beth Israel have built a solid record of fair treatment and mutual respect and will continue to do so without the need for outsiders whose basic interests are elsewhere. On the other hand, we believe that employees have the right to decide for themselves whether or not to join a union. We have let our employees know that they should feel free to discuss anything with anyone outside of working and patient care areas and outside of working hours, but they should reject the attempt by organizers to disrupt them at work. Unfortunately the union organizers have persisted in entering working and patient care areas, in violation of our rules against soliciting and general laws against trespassing. Such actions have demonstrated their lack of concern for both Beth Israel patients and employees.

Beth Israel employees know that this Hospital is a nonprofit institution, organized to provide the best health care available. The "Credo of Employee Relations" and the facts listed in our Employees' Handbook, "Working Together," help to illustrate the reality that we have many masters to serve: the patients; the Hospital em-

ployees; the medical staff; the students of medicine, nursing and other skills and professions; visitors of all types, and the community at large. The Hospital attempts to treat all fairly, with consideration and dignity. Operating a major university hospital is a complex affair, and problems are rarely to be conceived of in simple yes-or-no terms. We must be concerned with the technical calibre of the care we provide, with the human qualities of our attention to patients, with the responsibilities we have toward our employees, with the needs of teaching because of our role in training doctors and other health care workers for tomorrow, with the research that makes for excellence in care, and with the cost of the entire enterprise to the patient and the public. And we must juxtapose all these important needs with uncertain financial support and growing restriction from the Federal, State and City governments, and with price controls and other regulations. It is easier for union organizers, who have no responsibility to our patients or workers, to describe problems arbitrarily in simple terms, come out with "obvious" solutions, and make promises they cannot be held to. We have the more difficult task of living with the real problems that make up the complex nature of our many responsibilities, problems that cannot be changed by easy talk. Beth Israel Hospital has a good record to stand on and we will maintain our record of integrity and fair treatment in the future.

. . .

Joint Exhibit 5.

Newsletter from the General Director — 22 March 1973.

In order that there be no mistake about Hospital policy, here is a simplified restatement of Hospital rules

with reference to employees' activities on Hospital premises.

1. With the exception of the United Fund and Combined Jewish Philanthropies drives, no one may hand out literature or solicit any employee, staff member or member of the public for any purpose on Hospital work time, nor may they do so in patient, visitor or other public areas.
2. Employees are not to loiter on the Hospital premises before or after working hours.
3. At no time should employees engage in activities converting Hospital facilities to their own uses or for uses which are disruptive of Hospital operation or patient care.

This clarification of existing rules is necessary because of the activities of a very few employees who apparently have not been aware of Hospital policy. This simplified restatement derives from the Beth Israel Hospital Employees' Handbook, "Working Together," and from the statement on guidelines for non-hospital activities on our premises contained in the Employee Newsletter of 23 July, 1970.

. . .

Joint Exhibit 7.

Special Newsletter from the General Director —
18 October 1973.

As a result of a recent review of the union organizational activity at Beth Israel Hospital, held with the Massachusetts Labor Relations Commission, we wish to emphasize certain rulings so that all employees know where we stand:

1. Employees may distribute organizational literature during non-working hours, such as lunch periods or coffee breaks, in areas which are only for employees, such as locker rooms and employee lounges.

2. Secondly, as has always been our policy, employees may continue to discuss any matter, including unions, during specified non-work times and may engage in such discussions with fellow employees also not at work to enlist support of their particular viewpoints in employee-only areas or in areas where patients, visitors and employees not on duty are permitted to congregate and intermingle, such as the cafeteria and coffee shop.

3. Finally, we reaffirm the Hospital's position that our employees have the right to engage in or refrain from organizational activities as they see fit within the general Hospital guidelines, and we reemphasize once again that the Hospital will not interfere in any way with its employees' self-organizational rights.

If you have any questions on this matter, please feel free to discuss them with your supervisor.

/s/ Mitchell T. Rabkin
Mitchell T. Rabkin, M.D.
General Director

Joint Exhibit 10.

Newsletter from the General Director — 11 July 1974.

Over the past several months, one of the unions which was defeated in the election at Beth Israel last April has been distributing a publication claiming to speak for BI employees. Copies have been handed out in the Hospital and some have been mailed to the homes of employees.

On reading it, you would probably (and correctly) have concluded that the so-called newsletter contains distor-

tions of fact and out-and-out lies in an effort to discredit Beth Israel Hospital. You would also see the attempt to claim credit for every improvement in salaries, benefits and conditions of work that we are able to bring about. We were bombarded with such distortions from the union before the election and now we are getting more of the same, even though the union was given no welcome by Beth Israel employees in the secret ballot election last April. New Hospital employees may be interested to learn of that vote:

	Voting Unit A	Voting Unit B
For SEIU (Hospital Workers)	71	41
For 1199	51	
Against unionization	325	96

The union has claimed it wants to represent the wishes of employees. But after your clear-cut vote not to have a union, they have apparently decided that they know better what is good for you than you do yourselves, and thus the union is ignoring your decision that they keep out of Beth Israel Hospital!

Many employees have asked whether we can prohibit union solicitation within the Hospital. Others have complained of being bothered by union solicitors in the locker areas as they were getting ready for work. A few employees have told of being threatened when they refused to accept a union pamphlet.

Rulings of the Massachusetts Labor Relations Commission place certain restrictions on the activities of employees in soliciting and in the distribution of literature.

Hospital employees who want to solicit other employees for the union or other causes may do so when they are

not on their own working times, but only in two well-defined locations of the Hospital:

(1) Employee-only areas — employee locker rooms and certain adjacent rest rooms, and

(2) Cafeteria and coffee shop.

In the locker areas, literature may be offered. In the cafeteria and coffee shop, conversations may take place on a one-to-one basis but there is to be no setting up of special tables, public distribution of literature nor any form of coercion. Elsewhere within the Hospital, including patient-care and other work areas, the lobbies, corridors, elevators, libraries, meeting rooms, etc., there is to be no solicitation nor distribution of literature. Soliciting of patients and visitors is expressly prohibited at all times and places.

Since the directives of the Labor Commission permit employees off duty to solicit as described above in the locker rooms, cafeteria and coffee shop, it is important for all employees to be aware of their rights in such situations.

If you do not want to talk with employee-organizers, you do not have to. You may refuse to accept their literature. If you do take it, you may do with it what you wish — read it, keep it, throw it out, tear it up or give it away. If the employee-organizers bother you, you may ask them their names, where they work, and then tell your supervisor who has been annoying you. It is not proper to ask Security to remove an employee-organizer who is soliciting in the locker room or cafeteria or coffee shop as described above; that is against the directives of the Labor Commission. But if any employee-organizer should threaten you, report that immediately to your supervisor.

Individuals who are not employees have no right to trespass into your locker rooms. If non-employees are

soliciting there for whatever cause, you should tell your supervisor immediately.

The other side of this situation relates to the very few Hospital employees who have persisted in soliciting for the union. The Hospital rules are clearly stated. We attempt to carry them out in an even-handed fashion. If any violation of the rules is perceived, it should be reported to your supervisor immediately.

We believe it is unfair of those very few union supporters who now are placing their own opinions above those of the large majority of Beth Israel Hospital employees. But we will continue to be as fair as possible to all, because we have no fear in letting the facts continue to speak for themselves.

. . .

Joint Exhibit 12.

Newsletter from the General Director —
19 September 1974.

. . .

Several months ago, the Hospital was accused of unfair labor practices arising out of distribution of union newsletters within the Hospital last April and June. After preliminary discussion with the Massachusetts Labor Relations Commission, we republished the Hospital rules on distribution of literature in an Employee Newsletter dated 11 July 1974, in order that all employees know and understand what can and cannot be done in this regard, according to Hospital rules and the opinions set down by the Labor Commission.

In at least one instance, a security guard did go against the rules of the Hospital in a situation where literature distribution was permitted. We then took pains to re-

instruct all of the guards. Because the union pressed on with the complaint of unfair labor practice, we have held further discussions with the Labor Relations Commission and agreed to publicise the specific and detailed assurance which accompanies this Newsletter. Please read it fully.

As a result of this action on the Hospital's part, the complaint was withdrawn.

We hope that there will be no future instances involving distribution of literature where the rights of any employee are compromised or where Hospital rules are violated. If an incident should occur where you feel that your rights are being compromised unfairly, you should contact your supervisor as soon as possible.

. . .

Notice.

DISTRIBUTED PURSUANT TO A SETTLEMENT AGREEMENT APPROVED BY THE CHAIRMAN OF THE LABOR RELATIONS COMMISSION, AN AGENCY OF THE COMMONWEALTH OF MASS.

In a Decision ratified and issued October 5, 1973, the Labor Relations Commission ruled that employees off-duty have a right to distribute union organizational literature in employee-only areas.

WE WILL NOT interfere with this right. More specifically,

WE WILL NOT interfere with, restrain or coerce employees in the exercise of this right by preventing the distribution of union literature by employees during non-working time in employee-only areas of the hospital.

WE WILL NOT interfere with, restrain or coerce employees in the exercise of this right by threatening to

arrest employees who persist in their attempts to distribute union literature on non-working time in employee-only areas of the hospital.

WE WILL NOT interfere with, restrain or coerce employees in the exercise of this right by threatening to discipline employees who attempt to distribute union literature during non-working time in employee-only areas of the hospital.

BETH ISRAEL HOSPITAL
(Employer)

DATED: 12 September 1974

BY Mitchell T. Rabkin MD
(Representative)
General Director
(Title)

Joint Exhibit 14.

Newsletter from the General Director — 6 March 1975.

. . .

Several months ago, federal law brought hospitals under the jurisdiction of the National Labor Relations Board, removing us from the jurisdiction of the Massachusetts Labor Relations Commission. Because hospitals are a new area of responsibility for the NLRB, there will be new standards relating to distributing literature and to soliciting by employees and non-employees. As a result, the following policy is now instituted, superseding all previous policies on this matter.

There is to be no soliciting of the general public (patients, visitors) on Hospital property. Soliciting and the distribution of literature to B.I. employees may be done by other B.I. employees, when neither

individual is on his or her working time, in employee-only areas — employee locker rooms and certain adjacent rest rooms. Elsewhere within the Hospital, including patient-care and all other work areas, and areas open to the public such as the lobbies, cafeteria and coffee shop, corridors, elevators, gift shop, etc., there is to be no solicitation nor distribution of literature.

Solicitation or distribution of literature on Hospital property by non-employees is expressly prohibited at all times.

Consistent with our long-standing practices, the annual appeal campaigns of the United Fund and of the Combined Jewish Philanthropies for voluntary charitable gifts will continue to be carried out by the Hospital.

. . .

Joint Exhibit 15.

Mass. Hospital Workers Local 880
354 Longwood Avenue, Boston, Massachusetts 02215
Telephone (617) 738-0850

22 Oct, 1974

Dr. Mitchell T. Rabkin
Director, Beth Israel Hospital
330 Brookline Ave.
Boston, Ma.

Dear Dr. Rabkin:

In the past it has been our practice to distribute "As We See It" within the guidelines set forth by the State

Labor Relations Board. Since we are now under the National Labor Relations Board, different rules are applicable.

After talking to lawyers at the NLRB, it is our understanding that we would not be committing an unfair labor practice if we distribute "As We See It" in the cafeteria and coffee shop as long as we don't litter and we don't stand in an entrance. Therefore, we intend to distribute our next issue in the cafeteria and coffee shop during our non-working hours.

The hospital security guards are apparently presently instructed to stop us if we go from table to table with union literature. It would seem appropriate for you to consult with the NLRB and your lawyers, and if they agree that we are within our legal rights, re-instruct the security guards. This seems like a much less disruptive process than going through the present procedure of our being stopped by security guards, called in by our supervisors, and our filing another unfair labor practice charge over this issue. This only wastes your time, our time, and our supervisors' time.

If we are stopped by security guards in the cafeteria and coffee shop and called in by our supervisors, we can only assume that harrassing union supporters is more important to you than leaving all of us undisturbed to perform our hospital functions.

Sincerely,

BI Employee Organizing Committee

Joint Exhibit 16.

25 October 1974

TO: Filo

FROM: Mitchell T. Rabkin, M.D.
General Director

At about 1:00 p.m. on Friday, 25 October, I observed Ann Schunior in the South side of the cafeteria, carrying a pile of "As We See It," the union newsletter for Beth Israel Hospital, and walking around from one table to the next offering the newsletter to people sitting at luncheon. She was not engaging in specific one-to-one conversation with any particular individual and then handing over a copy of the newsletter in the course of that conversation; rather, she was table hopping and offering the newsletter generally to anyone in her immediate vicinity. She was accompanied by Molly Maurer for part of the time but Miss Maurer was not seen by me to be carrying any literature nor offering it.

I spoke to Miss Schunior telling her that she was violating Hospital regulations. She replied with the query whether I was aware of the fact that the NLRB regulations were different from those of the Massachusetts Labor Relations Commission and that what she was doing was consistent with the former. My answer was that the issue, as far as I was concerned, was that she was violating Hospital regulations and that if she did not cease this activity of mass distribution, we would be obliged to look on this as a flagrant disregard of Hospital regulations. I asked her if she were aware of the regulations again, and she repeated that she was indeed.

I then walked away and she resumed distributing literature to a few more people. I spoke to her once again

telling her that she was flagrantly violating Hospital regulations at that point — was she aware of that fact? And she repeated that she was. I pointed out that if she continued to violate the Hospital's regulations so flagrantly, we would be obliged to regard this as "very serious." I asked if she appreciated the fact that we would regard it as very serious, and she replied that she did.

Miss Schunior then walked away and, after chatting briefly with Miss Maurer, appeared to leave the cafeteria. A few minutes later, she was back carrying the literature as before, and I observed her to be talking with a woman who was a representative of the Wells TV organization, not an employee, who was seated at the end of one table in the cafeteria. I did not see whether she passed out any further literature at that point.

As I left the cafeteria, I saw one of the Housekeeping supervisors, Mr. Al Saunders, observing Miss Schunior, and I remarked to him that I had warned her that she was violating Hospital regulations and that he need not repeat that warning. I pointed out that further action would be taken up with Miss Schunior's immediate supervisor, and I left the dining room.

About 15 minutes later, I returned to the dining room and did not see Miss Schunior or Miss Maurer in evidence. Mr. Saunders was there at lunch. I asked him whether she had continued to distribute literature around at tables and he replied that this was indeed the case. Miss Schunior also, according to Mr. Saunders, came up to him and inquired whether Dr. Rabkin had instructed him to keep an eye on her.

lld

cc: Robert Chandler, Esq.
Miss Anne V. Cronin

Joint Exhibit 17.

BETH ISRAEL HOSPITAL
BOSTON, MASS. 02215

WARNING NOTICE

Employee Ann Schunior (Name) Date October 25, 1974

Department Medicine Division Clinical Services

This warning notice has been issued to you because According to Dr. Mitchell T. Rabkin On 10/25/74 you violated the Hospital rule against distribution of literature in the cafeteria. You continued to violate this rule despite several verbal warnings from the General Director that you were in flagrant violation of such rule and admission on your part of your knowledge of the existence of such rule.

This is the first ☐ second ☐ FINAL X warning:

/s/ Mitchell T. Rabkin MD
28 Oct. 74

Further violations will result in: dismissal

I have read the above and understand it.

Miss Schunior has read the above but has declined giving her signature.

Signed _____ Signed /s/ Stephen Robinson, M.D.

Employee Supervisor

Oct. 28, 1974

Copy #1 to Personnel; Copy #2 to Division Head; Copy #3 to Employee; Copy #4 retained by Supervisor

Joint Exhibit 18A.

As We See It—April, 1974

. . .

Why is there so little linen that patients do without and the workers in the laundry cannot spend Sunday with their families?

Joint Exhibit 18B.

As We See It—May, 1974

WHO CARES ABOUT PATIENT CARE?

Part I

The staffing in Chest Physical Therapy has been cut to the point where there is no staff working on evenings, nights or Sundays. Chest physical therapy helps keep patients from developing pneumonia. Who cares if patients need this care on evenings or Sundays? Who cares about understaffing?

Joint Exhibit 18C.

As We See It—June, 1974

WHO CARES ABOUT PATIENT CARE?

Part II

. . .

Who cared about patients without adequate nursing care?

. . .

Joint Exhibit 18D.

As We See It—July, 1974

Many employees are concerned about improving patient care. Beth Israel is a better hospital than most. Most employees are competent and work very conscientiously. But an administration with more interest in new buildings and public concern for patient care than dealing with the problems like understaffing that detract from patient care can lead to situations like this:

SUCCESSFUL BIRTH IN SPITE OF BI

I've worked here for two years. When it came time for me to stop working before I had my baby, I got twelve different stories about how long I could stay out and what would happen to me when I came back.

. . .

I was left alone in a room. A nurse came in and shaved and prepped me — then I was left alone again.

I was scared. I'd never had a baby before, and I didn't know what was happening. The pain kept coming right behind each other. Whenever the pain came, I screamed. The nurse would come in between pains and say, "It's gone away," and leave me alone again.

At 8AM, I asked her to call my husband. She told me he'd be right in. I waited and waited, but he didn't come.

At 8:15, the doctor came in, but I couldn't turn over because I was in too much pain, so she left without examing me. I wanted to vomit. My stomach was hurting, my back was hurting, but she said, "Well, she's all right," and she left. She went home, and it seems that she didn't tell the next doctor on duty what was happening to me.

A nurse came in and asked me where it hurt. Where else would it hurt but my stomach? I was in too much pain to answer her, so she left.

A few minutes later, my water broke. I didn't know what it was because it was my first kid, and then my baby tried to come out all by himself. I screamed, and another nurse came in and rushed me to delivery. Then a doctor who didn't know what was going on with me came in and finished the delivery. I heard him say, "But I don't know anything about the patient."

I was supposed to have an epidural (kind of anaesthesia), but I had to have him natural, because my baby was already

coming out. They had to put ether to my nose, and they let me tear, and afterbirth was left in me. I should have gotten an intravenous, but I didn't.

. . .

Wednesday I was back in with terrible pain. I called my obstetrician and told him I was still discharging placenta. He told me to come in through the EW. They sent me to walk-in. No doctor was there. They gave me the runaround. I went back to the EW. They started to say they hadn't sent me to walk-in, so we got angry and we left.

I called another obstetrician I'd seen sometimes in clinic, and she said to come in at 9 the next morning. She gave me some Urgetrate to cause contractions and get rid of the rest of the afterbirth.

Before I came into the hospital, I signed a paper saying that I only had to pay $600, and I got the bill and it was for $900. I saw Dr. Rabkin one day and I asked him about it. He said he didn't know about individual cases. He asked me my name, but he didn't write it down. If you work in a store, you get a discount on what they sell. What do you get for working here?

They tried to cheat me out of my maternity leave, overcharged me, and totally ignored me while I was a patient. My experience was bewildering, painful, and ugly. I was lucky it wasn't a complicated delivery. Don't ever have a baby here unless you have a private doctor.

A BI Employee

Joint Exhibit 18D.

Joint Exhibit 18F.

As We See It—September, 1974

Through the Grapevine:

Hurrah! for the girls of the Main Kitchen (dietary). I heard through the grapevine that they staged a walkout on the bosses. Such a contrast to the frightened creatures who (not very long ago) would have subjected themselves to any injustice as long as it pleased the bosses. These girls were scheduled to work until 5:45 pm. About half an hour after the tray line had started for the patients' dinner, it was stopped. Reason — it was too early for dinner. Twenty minutes later they were given the OK to continue the line. As it turned out, the bosses had misjudged. They expected us to work late without pay. At 5:45 the girls dropped their tools lik hot potatoes and walked out. "Right On" girls. You've come a long way, baby.

No Exit

Have you noticed all the lost people floating around the hospital? You can find them anywhere, from the eighth floor to the basement, asking plaintively, "How do you get out of this place?"

They grab onto anyone wearing anything vaguely resembling a uniform, and ask for help. The last one I encountered sighed, "By the time you get out of here, you're so tired."

They are mostly out-patients who are not the healthiest of people to begin with, and who have already gone through a long day of being shunted from clinic to x-ray to laboratories, and are worn out.

Why can't the hospital administration provide good signs for these people clearly showing them the way out? If the administration cares about our patients as much as it says it does, why can't they show them this courtesy?

. . .

A PAIN IN THE BACK — Adventures of an X-Ray Technician

My back hurt. The pain ran from the middle of my lower spine to my knees. I could hardly stand up straight and if it weren't for the fact that our patient load was — as usual — heavy, I would have tended to it. All I could do was lean against the film processor so that the heat given off could relax my back muscles.

But don't worry, folks, I had some consolation. The two other technicians that I was working with also hurt their backs. I guess it was due to the fact that we are understaffed.

They say that we will be getting another technician for the 3:30 p.m. — 11:30 p.m. shift in October, so that there will be four people to try to keep up with enough work for five technicians. I know that I didn't hurt my back by doing something foolish since all x-ray technical employees are trained how to move heavy patients who cannot help themselves. But there's only so much any back can take — even using proper techniques.

To date there have been four x-ray technicians who have been bedridden with back injuries. When will the hospital administration adequately staff their shifts so as not to have such incidents occur? Who will be next?

Marsha Kaminsky

. . .

Patient Care

Whenever the opportunity presents itself (which is often enough) the Dietary bosses never fail to impress upon the workers that patient care should be their main interest and that it should take second place to nothing, yet as far as they (the bosses) are concerned, when the weekend comes the workers are solely responsible for patient care. The

patients can go to hell for all they care. They are certainly not leaving their pet hobbies to come see about patient care.

Joint Exhibit 18G.

As We See It — B.I. Employee Newsletter.

My Employment at B.I.

I am an employee in the Medical Records Department at Beth Israel Hospital since November of 1972, and still am up to this time.

Six months after I started, I began to have problems with the job I was assigned to, so I went to the Personnel Department to ask for a transfer. I told Miss Flynn that I saw a job posted on the bulletin board which I was interested in. She set up an interview for me, but when I went for the interview, she told me that the job had been filled.

I tried to get transfers three more times for specific jobs, but I never got them. One time I was called into the office by my department head and was told that she did not appreciate me going over to Personnel to ask for a transfer, because if I am not happy in the record room she don't think I would be happy anywhere else in the hospital so I should seek employment somewhere else at some other company. I in reply said to her it's not for her to make decisions for me, she should let me decide for myself what is good for me.

In July of 1973 I was introduced to a union for hospital workers by a fellow employee. I became interested by attending their union meetings sometimes twice a week. I was involved by being a member of the Organizing Committee which means I got other fellow employees to sign union cards and asking them to attend the meetings.

My supervisor, Mrs. Richmond, got to know that I was involved. Then I suddenly began to have more problems on my job. She has been harassing me since, by asking me why

I have not been sending out more correspondence, and telling me that I have to pull my own charts and do my own micro-films, etc. I finally got the message that she knew I was involved with the Union. Anyway I accepted the extra responsibilities that was given to me, but the harassment went on and on. I have been told by one of my fellow employees that she was asked by my supervisor if, as I was called, "That Pam" was trying to get you to join the Union. Another employee was asked if she had seen "That Pam" out there in front of the hospital giving out leaflets.

On June 12, 1974, I injured my knee on one of the desk drawers in the record room. I had not reported it the same day to the health service but two of my fellow employees saw when it happened and I had mentioned it to several other employees in the department. I kept on working until the following week I noticed my knee was swollen. I went to the Employee Health Service, then to the Emergency Ward, and finally to the Orthopedic Clinic. I was told to take time off from work, which I did. Later I went back to work, but continued seeing a doctor in the clinic.

continued on page 2

IN THIS ISSUE . . .

Dead End Jobs
Hospital Rate Increases
X-Ray Techs Air Greviences [sic]
and more . . .

[2]

On July 10, I had a clinic appointment, but I asked the clinic secretary to call me in the record room when the doctor was ready so I could work while I waited. After I was seen in the clinic I went back to work not eating lunch or anything. I was approached by Linda Duffy, one of the

assistants of the department head. She said to me, "Pam, what were you doing downstairs?", not saying it in a mannerly way but as if she was talking to one of her kindergarten students. I in return answered her by saying, "What do you think I was doing downstairs?" I imagine she did not like the way I answered her, so about ¾ of an hour later I was called in to her office. Behind closed doors she said to me, "Since January you have been out 9 days of which you have been paid for 7 days". I told her 7 days are my sick days and 2 days are the days I took off when thieves broke into my apartment. She said it was not up to the department standards. They wanted someone who can work a 40-hour week. I said to her I am entitled to 10 sick days a year and if I am out sick I did not think I should get a warning notice. She tried to give me a warning but I did not sign it. She took me to Personnel, but I still wouldn't sign it.

Six weeks later, on August 28, I was out sick suffering from abdominal pains. When I returned to work the following day I was called into the department head's office and was issued a second warning notice for being out sick. She said if I should be out sick again I should bring a doctor's certificate giving the reason why I could not work or come in to the employee health service and let them decide whether I can work or not. I again refused to sign the warning. I was taken again to Personnel. I still did not sign the warning. Miss Hansen also told me that I should seek employment in some other company. I guess by now there was no way I would get a transfer because they want me out.

Last and finally I was told by the assistant director when I was hired that if at any time I have other business to take care of I can take the time off and make it up at a later date. I have done this for doctor's appointments and emergencies. On October 2, I had asked to leave an hour early on Thurs-

day the 3. After I had asked, I was called in the department head's office and was told that they will give me the time off but that I would not be paid or allowed to make up the time. I had asked why; the answer was you have taken more time out than any other one in the department. I then replied, "I make up the time." She said, "I don't care, but if you should ask for any more time out that will be the end of your employment."

I have planned my vacation for Dec. 21 and I think that this is what they are trying to gyp me out of. I want you to know that I will not sit down with all this aggravation, I am fighting it, and I have other employees to support me.

Pam Spencer

HOLIDAY WORK

There have been several holidays lately, and they've left a lot of us feeling cheated. This is why:

1. We work the holiday. There are fewer people working then other days, but the patients' needs are just the same. We often end up doing more work than on a regular day.
2. The supervisors ask that we take a day off with pay some other time — some time of the supervisors choosing — rather than being paid for working the holiday, so we don't sign — for the holiday.
3. A few days later, or earlier, but in the same week, the department is very busy, or someone is on vacation and their work needs to be done, so we work overtime.
4. Payday comes around and we discover that we have only been paid straight time for the extra hours. We have worked well over 40 hours, are exhausted, but are not justly compensated for our efforts.

More than 8 hours per day is overtime and we should be paid for it. We're tired of the administration taking advantage of us in every way it can.

[3]

Room Rate Increases — Don't Blame the Workers

Once again the hospital rates have gone up at BI and other Boston hospitals. At BI private and semi-private rooms have gone up about 24% since May. Intensive Care rooms have gone up 47%! (see chart). Clinic rates (BIAC, walk-in, specialty clinics) have gone up just as much. In June BIAC medicine went up from $18/visit to $20. In October it just went up to $23. This is a 27% increase. In October alone BIAC walk-in jumped from $10/visit to $14 — a 40% increase.

A common view is that the increase is due to "rising personnel costs" — our salaries. But that just can't be. Salaries make up about 60% of most hospital budgets. Our salaries have gone up 14% since May. A 10% rate increase would cover the cost of our salaries. Where is all this money from rate increases going? We're sure not getting it!

Before May: cost of room/day	May increase new rate	% increase	Oct. increase new rate	% inc.	% increase since May
Private room $125	$140	12%	$154	10	23%
Semi-Private $104	119	14%	129	8	24%
Intensive care $225	295	16%	375	27	47%

". . . Divided We Fall"

It's time to take a stand against the racial hostilities that are so strong all over Boston now. Any working class family living in Boston must send their children to bad

schools. All of us working at BI need better working conditions and pay. It has nothing to do with color or nationality.

Many people with power have an interest in keeping us fighting. If we fight over who will go to what school, then no one will be fighting for better schools for all of us.

It's the same in the hospital. Here we have a split between whites, American Blacks, West Indians and Spanish speaking people. Clearly, there is discrimination in the hospital between whites and members of minority groups. But what about between different minority groups? Many Spanish speaking feel West Indians get treated better. Many West Indians look down on American Blacks. Is there really that much difference in the way we're all treated? All women in the kitchen work a hard 10-hour day, regardless of their race or nationality. Many of us are working in under staffed departments. None of us are getting paid what we should.

Our prejudices only help the bosses. Workers must stop fighting each other and work together for a better community and better jobs.

[4]

The Dead End Job

How many people do you know in the BI who've moved to new and better jobs? Not many, are there? We all seem to be stuck in dead end jobs. A few people get lateral transfers, but these rarely involve new skills to be learned. Usually they're jobs that aren't better paying — just a move to a new department.

This lack of mobility hurts minority workers the most. It is common knowledge that most workers in lower paying

jobs — dietary, laundry, housekeeping, transportation, etc. are minority people. Almost all technicians, nurses, etc. are white. Anyone who doubts this should just look around.

BI does participate in a number of training programs. It does all or most of the selection of students in the following programs: X-ray technology, Biomedical Photography, Dental Assistants, and Dietary Interns. These programs, combined, have about 50 students. Only about a half dozen of them are minority people. Most of the students will not be hired on as permanent workers. It is clear, then, that BI's training programs do not change the pattern of racial discrimination by job category.

In addition very few of the students are former regular BI employees learning a new skill. The barrier, of course, is money. Some students are paid stipends which amount to less than Federal minimum wage. Some are paid nothing. Most must cough up tuition fees as well. This excludes almost any employee with family obligations.

Programs that will provide ways out of dead end jobs are needed. Unions and hospitals in New York have developed plans which pay workers to train for better jobs. An educational fund will pay a worker's tuition plus up to 85% of his or her old salary while he or she learns a new skill. Employees train to be RNs, LPNs, medical technologists, cooks, physicians assistants, maintenance technicians, etc. High school equivalency, High school review, and English as a second language programs are also available to help workers prepare themselves to train for new jobs.

Job-upgrading programs in New York only came into being with unionization. We would ask the BI administration, what is it doing to help employees advance themselves by learning new skills?

Pay Us Once a Week

We workers at the BI get our paychecks every two weeks. It is very hard, especially with inflation the way it is, to make a paycheck stretch over two weeks. It especially hurts workers who have to support families because there are more bills to pay and more reasons why the money slips away — like needing to buy milk for supper and needing to give children lunch money. There is ONE reason why it's easier for the people at the top who get big paychecks to make it last until the next paycheck or usually even longer. It's because they make MORE money. Their money lasts longer. They don't need to spend it all on food and bills.

Besides the administration just not caring about workers, they are also making money on the two-week paycheck deal. Instead of the money going in our pockets every week, it goes in the bank where the BI collects interest from it.

We called 35 hospitals and 28 of them pay workers once a week. Some of the hospitals that pay once a week are: Cambridge City Hospital, Children's Hospital, Deaconess Hospital, and Peter Bent Brigham Hospital. BI should pay us once a week, too.

[5]

Radiology Head File Clerk Resigns

September 27. Ivan Bath, Head File Clerk of the Radiology Department, resigned his position. In a written statement, Bath cited BI's refusal to deal with understaffing in the File Room as the primary reason for his resignation.

The X-Ray File room is open from 6am to 9pm and must file reports and films on 75 to 200 cases a day. There are a total of five full time workers and two part-time workers to do this job.

Over the summer one half-time weekend position and one half-time weekday position were eliminated from the file room. In addition, of course, no vacation coverage was provided.

The result was that file room workers were forced to work long hours of involuntary overtime. This has led to low morale and fatigue. Reports and films have become backed up. Doctors can't get their films and reports on time. Patient care is suffering.

Instead of dealing with this situation by trying to improve the staffing problem, the administration preferred to try to scapegoat Bath for "poor management." His response was to resign, after 7½ years of service. He will be missed by patients and workers.

You have to wonder what kind of an operation BI is running when it lets people like Ivan Bath go.

Joint Exhibit 18G.

X-ray Techs Air Greviences

At a recent departmental meeting, X-ray technicians raised some of their grievances. The main problem is understaffing. The techs would like another X-ray technician for the evening and weekend shifts, a darkroom technician on the weekend and someone to take over for the weekend receptionist who has been out sick. It was also brought up that another room is needed for routine work (bones, chests, etc.,) in the morinings. The idea of 45 minutes instead of a half-hour for lunch was also mentioned. The chief technician agreed to do her best to try to deal with some of these issues.

The problems in X-ray are very similar to the problems in many other departments. Understaffing is common at BI. It is something that the trustees and administration have an interest in — it saves them money. One department by itself can't bring much pressure on management. This is why we need a union — so we can unite the various departments to demand as a group the improvements we need.

[6]

A Good Union Contract.

A new union contract in New York City between S.E.I.U. Local 144 and the Association of Private Hospitals provides for a $20/week across-the-board increase for all 8000 hospital workers covered by the contract. This brings the minimum salaries in those hospitals to $171/week, and this is for a 35 hour week!

In addition to that, there will be a $2/week increase for each per cent increase in the New York City Consumer Price Index over 5 percent.

All employees who have worked for 5 years will get 4 weeks vacation, and those who have worked for 15 years will get 5 weeks vacation/year.

Wages and vacations are really getting better for unionized hospital workers.

Overtime for Nurses

Lately the supervisors have been saying that the nurses on our floor have been putting in for "too much overtime". Yet every time you turn around, there's a supervisor pleading with you to work a double. Besides that, at shift change, it seems that report usually lasts an hour or more. Oh, we'd be GLAD to leave at 11:15 sharp — every night!

Letters:

Oh Johnny, Oh Johnny. It's time you left behind your slavery tactics back home. We are in a Mod World. Also remember you were once in that same Green Uniform.

A Dietary lady subject to gastric complaints one morning walked out for her break with a cup of hot water. Johnny yelled, "Graham, what have you in that cup - Farina?" Graham replied, only hot water. Johnny did not take her word and followed Graham to the locker room and made her open up the cup — it was only hot water.

Privileged supervisors are blind to signs and partake in sumptous meals free of charge from food trucks. Oh Johnny — they are meant for patients. Don't cause any pain — the line is aware of your tactics. Your deceptive black smiles and flowing language is only good for whites. But, we Blacks know — you are a pain in the neck.

Pistol Packing Mamma, BIH

October '74

Mass. Hospital Workers
Local 880
Service Employees International Union, AFL-CIO
354 Longwood Avenue, Boston. Telephone (617) 738-0850

Joint Exhibit 18H.

As We See It—November, 1974

Unattended Specimens

Not only do patients sit on bedpans too long but specimens go bad. There has been much discussion about understaffing at the Beth Israel. Most often the concern is lack of nurses and nurse's aides on the floors as directly affecting patient care. But one of the major ways of diagnosing a patient's illness is having tests performed. With insufficient staff in the laboratories incredible things can happen! Specimens often times must have immediate tests done on them or at least be refrigerated or incubated. Due to understaffing, lab specimens sit on countertops for hours, therefore results are misleading or altogether wrong. Accuracy of lab reports is crucial in diagnosing and treating a patient's illness.

- a concerned secretary

These are some of the improvements that we at Beth Israel need. Unionized employees could negotiate these issues. We're STILL waiting to see what B.I. does on its own . . .

	solved	not solved
1. A career ladder providing adequate training for employees to move to better jobs		/
2. Employment preference for present employees who could be trained for new positions		/
3. Increased minority hiring, especially for technical positions		/
4. Free English classes on work time		/
5. Adequate staffing		/

	solved	not solved
6. Across the board 50¢/hour increase; $3.50 minimum wage		/
7. 10% "catch-up" cost of living raise	/	
8. Automatic quarterly cost of living raises according to government figures		/
9. Fully paid Blue Cross/Blue Shield for both individual and family plans	/	
10. Liveable pension plan with equitable benefits and automatic cost of living increases		/
11. Quick grievance procedure with independent arbitration as final step		/
12. End dead-end pay scale; provide automatic longevity increases	!	!
13. 4 weeks vacation after 5 years 5 weeks vacation after 10 years		/
14. 12 days paid sick leave per year 3 days paid leave for personal reasons		/
15. Double-time-and-a-half for working holidays		/
16. Fully pro-rated benefits for all part-time workers based on hours actually worked		/
17. Pay or time off for overtime work at employee's option		/
18. Safe and comfortable working conditions		/
19. Cafeteria food at cost; free meals during overtime work		/
20. Right to present demands as a group		/
21. 24 hour MD staffed employee health service		/

	solved	not solved
22. Right to see your own personnel file		/
23. Free employee parking		/
24. Pickup service to Kenmore and Dudley Sta.		/
25. Protection to and from transportation for employees after dark		/
26. Adequate protection for EW personnel		/
27. Free day care		/
28. Guaranteed respectful treatment		/

[Footnotes omitted.]

Joint Exhibit 18K.

As We See It—February, 1975

As for us who work in transportation, (etc.), we know that B.I. secretaries, and even many nurses, are some of the most pressured and the lowest paid of hospital secretaries and nurses around, and that they need a union as much as we do; and while we can't let them take it out on us, we shouldn't throw mud back at them either. We should try instead to fill them in on how we've got it bad too, and how we have to stick together to build a union to take it out on the people who are really responsible for the understaffing that makes the delays that make bad patient care that makes the pressure that makes the hollering!!

Joint Exhibit 18L.

As We See It—February, 1975

BI's "Deficiencies"

BI is licensed for 374 beds. When the Department of Public Health came to inspect BI last December, there were 390 Beds.

Much of the hospital is "not maintained in a sanitary manner."

Patients records are not always complete because treatments patients receive are not always recorded in their records. Autopsy reports more than three years old have still not been filed in patients records.

The pharmacy is not staffed at night, so that nursing supervisors have to be responsible for getting medicine from the pharmacy after 9 p.m.

Respiratory treatments ordered by doctors are not always performed.

. . .

As far as respiratory therapy treatments are concerned, BI just said that the most acutely ill patients get their treatments, and they try to talk the doctors who order treatments which are "desirable but non-essential" out of their orders!! So patients who need the treatments to stay alive get them, but those who need them to get better don't get them.

. . .

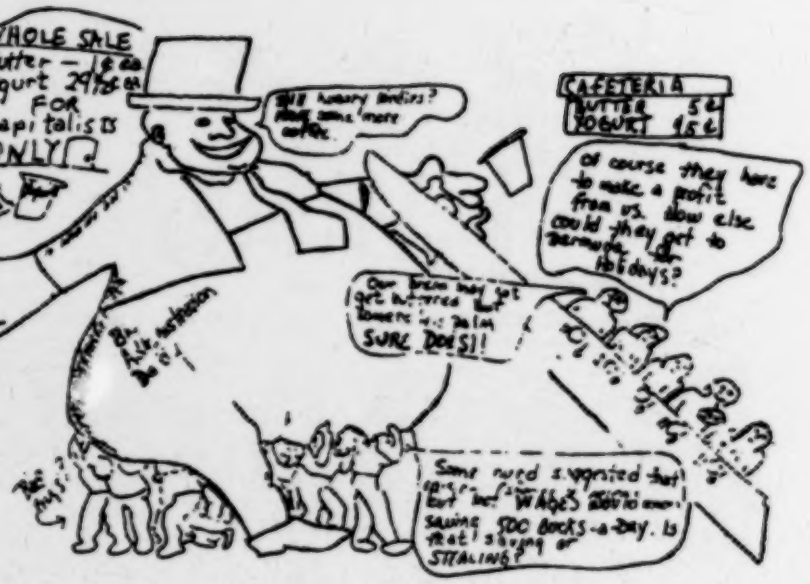
Who You Callin' Bad?

We aren't supposed to talk about building a worker's organization or a union because the cost-of-living raises, the better benefits and the overtime pay we'd get with this might mean less money for patient-care. But what about the fat salaries administrators get that are two, three or four times the pay we get!! The difference between their pay and ours could hire a whole lot more nursing and service people, giving jobs to the unemployed and really improving patient care.

My BAD idea is to dump rich people from the Administration, (because if they can take the salaries they're taking, they obviously don't give a damn about the patient care

and shouldn't be working in a hospital in the first place), and then put the couple of hundred thousand dollars a year we'd save into new nursing and service positions. Then the hospital wouldn't need to steal back our paychecks in the cafeteria, charging us 45¢ for yogurt that costs the hospital 29½¢ and 5¢ for a pat of butter that costs the hospital only a penny, etc., etc.

Joint Exhibit L.



Joint Exhibit 18M.

Joint Exhibit 18M.

Joint Exhibit 18M.

As We See It—April, 1975

Nurses Oppressed by Understaffing!

I'm working as a nurse at Beth Israel and wish to express some of the oppressive feelings that I, and probably most nurses here, are experiencing.

. . .

The basic problem? Understaffing might sound familiar to you. It seems that everytime I protest the inadequate staffing, I am informed by a few more experienced BI nurses that the "staffing has been much improved from only a year ago." But the fact remains that the ratio of patients to nurses presents a hazardous environment and precludes the delivery of optimal health care.

If you are working on the floors, the consequences of this understaffing are evident:

How often are you knowledgeable of the medical status of your patients? When a relative or friend of a patient asks you "How is she/he feeling?", can you really answer the question? (Often I'll know if the patient has voided or eaten well, but she/he may have impending congestive heart failure for all I know.) There are times when I can skim through the patients' charts, but that opportunity should occur with every patient who is under my care. Even though I've become somewhat adjusted to it, I still resent knowing usually only the medical diagnosis stated in the Kardex.

How often do you go on medical rounds? I have always believed that nurses are an integral of the "medical team" but it seems otherwise on most of the floors. Excluding social service rounds (if you have the time to attend them), the opportunity to contribute to a patient's plan of care remains with scattered moments, whenever you're around

and/or when the intern is available. Since we do spend the most time with patients, it appears logical that we should be both highly informed about that patient and participate in the planning of her/his care.

. . .

The inadequate communication of course exists among nurses. We have our Kardexes to relay information, however, not much time is available to complete and update them.

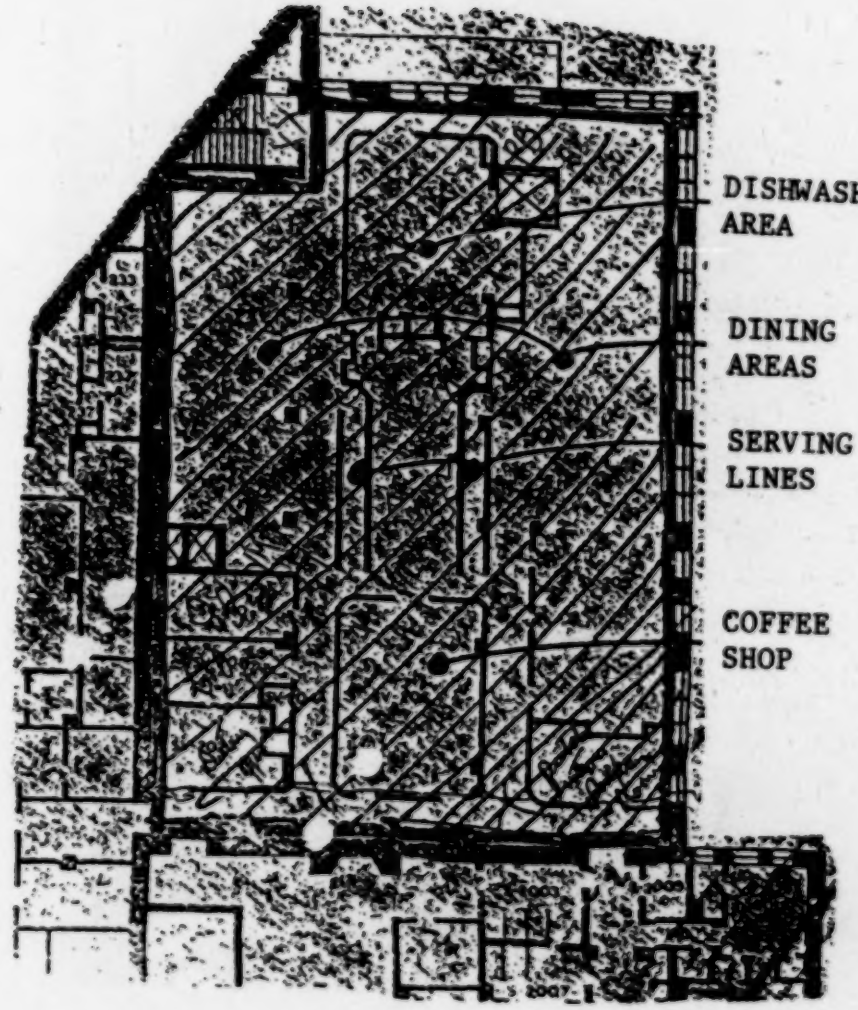
Inservice Education was a primary attraction for me in applying to BI. For the few conferences given, I've rarely had time to attend them. Usually it means a compromise of the total care I believe each patient should receive.

At times, the understaffing causes me to lose my perspective on patients' hospitalizations. I might resent their "fussiness" or "talkativeness" only because I have so much to do with other patients. And that just makes me feel worse about my job and, therefore, myself.

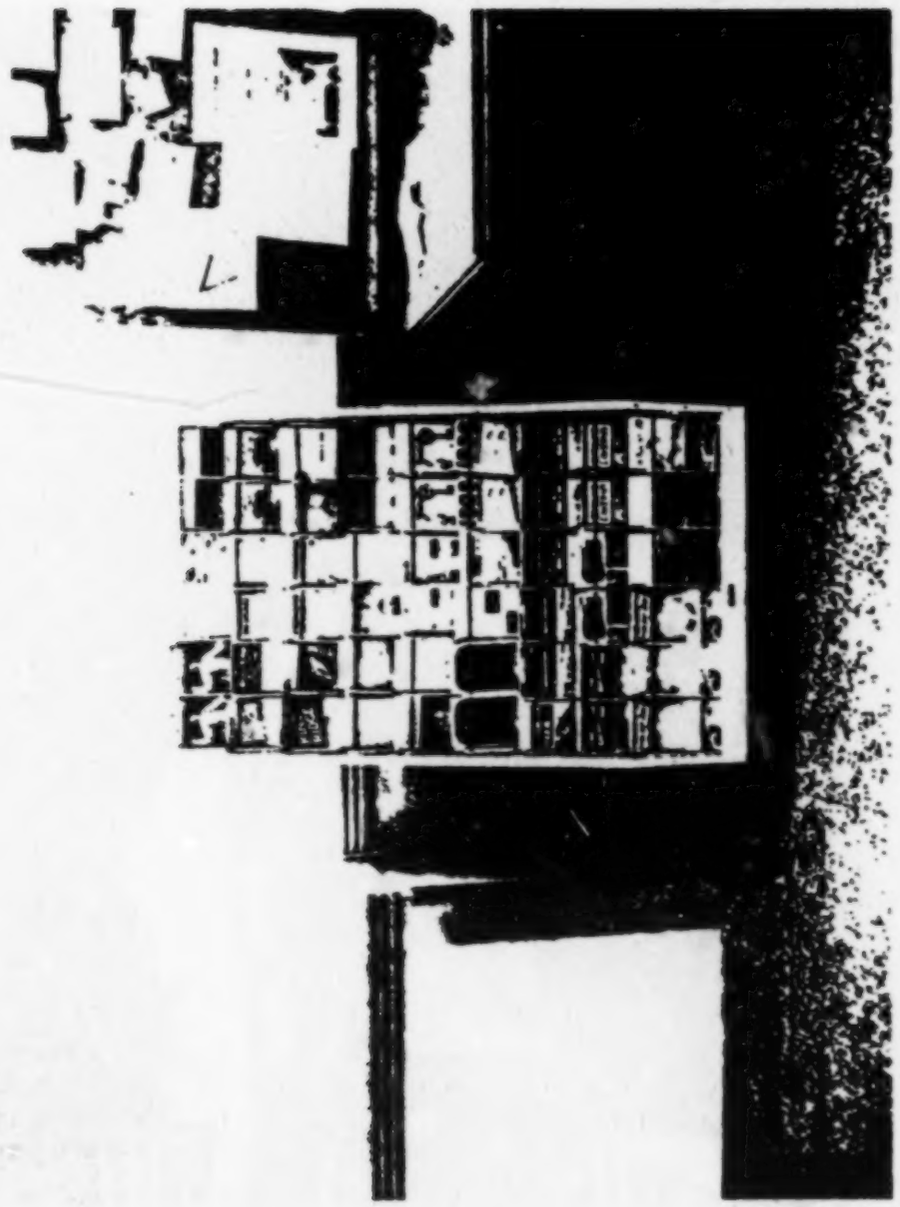
The patients are also being compromised when we come to work with a cold. Yes, we have "sick days", but how often are you pressured, interrogated and made to feel guilty when calling in? When doing so, of course you feel as if you're "letting down your fellow workers", particularly because it's very likely that your floor will be only more understaffed.

. . .

Joint Exhibit 20.



Joint Exhibits Photographs 21A, 21B, 21C and 21E follow.



YOU
CAR POOL BOARD

Joint Exhibit 22A.

Newsletter from the General Director — 30 November 1972.

. . .

Tuesday, 5 December: One new activity this year features a special day where administrative personnel will serve a free meal to you in the cafeteria. Your supervisor will give you a computer card bearing your name which will be your ticket entitling you to one free meal on Tuesday, 5 December, either breakfast, lunch or dinner. Even if you can't eat with us on Tuesday, be sure to deposit your ticket in the cafeteria anyway because it will be used for the drawing of door prizes later in the week. For further details on the menu for that day, check the cafeteria bulletin board.

Wednesday, 6 December: Employee Service Awards will be given to employees celebrating anniversaries of 5, 10, 20 or 25 years or more at the Hospital. This year over 200 such long-time employees are being honored. Following the presentations by Mr. Sidney Stoneman, President of the Board of Trustees, and by me, there will be a tea for the honored recipients and their families in the South Cafeteria.

Joint Exhibit 23A.

We need 15 good people. Do you qualify?

Joint Exhibit 23A.

We Need 15 Good People

Beth Israel Hospital is forming a softball team to compete in the Boston Hospital League of the American Softball Association. To do so we need 15 good people who can play softball, or who would like to give it a try.

Do You Qualify?

You can find out by attending a meeting on Tuesday, March 25 at 4:00 P.M. in the Kirstein Living Room.

The BI team is run by employees for employees. Call Gil Costa at 691 or Peter Sugarman at 2138.

Remember —

Attend the meeting on the 25th if you want to join the BI softball team.

Joint Exhibit 23B.

BETH ISRAEL HOSPITAL
BOSTON, MASS. 02215

WARNING NOTICE

Employee Peter Gerace — Date March 19, 1975

Department Public Relations — Division Development

This warning notice has been issued to you because I have been advised that you violated the hospital rule against distribution of literature in the cafeteria, coffee shop and other public and work areas of the hospital and you instructed two other employees to post this literature in unauthorized areas.

This is the first X second ☐ FINAL ☐ warning:

Further violations will result in: Disciplinary Action

I have read the above and understand it.

Signed /s/ Peter Gerace Signed /s/ David Bassin

Employee Supervisor

Copy #1 to Personnel; Copy #2 to Division Head;
Copy #3 to Employee; Copy #4 retained by Supervisor

FA 44

Joint Exhibit 24.

Patient Information Booklet.

This booklet is designed to familiarize you with the people who will take part in your care, and with the facilities and services available to you. You are the focus of our attention. More than 2,500 members of the Beth Israel Hospital staff are working to speed your recovery and to make your stay as comfortable as possible.

Hospital schedules and routine procedures are designed to give you the most modern and efficient medical care available. Many aspects of hospital routine will be new to you. We would like to explain some of them to you in the following pages.

If you have any questions, please feel free to ask your doctor, nurses, or hospital-services manager. To assist you further, we have established a special telephone number: C-A-R-E (Extension 2273). If you desire more information about any of the services and conveniences described in this booklet, or if you have a complaint to register you can dial C-A-R-E (Extension 2273) 24 hours a day, 7 days a week. Your call will be recorded in the log book and the appropriate Hospital staff member notified. You will receive a speedy reply — usually within minutes — to your problem.

/s/ Mitchell T. Rabkin, M.D.
Mitchell T. Rabkin, M.D.
General Director
Beth Israel Hospital

Your Identification Band must be worn at all times. It assures that all the staff involved in your care will know who you are, even when you're asleep or away from your room.

. . .

Your Meals: We know that pleasant mealtimes are not only part of good patient care but are also important diversions during the day. We want to make your meals as gratifying as possible even though we may not be able to satisfy your dietary preferences completely.

. . .

Visitors: Your family and friends are welcome to visit. They must observe certain procedures so they won't interfere with your rest or disrupt the routine of good hospital care. The maximum number permitted in your room is two visitors per patient. Loud conversation, smoking, and sitting and lying on your bed by your visitors are not permitted. Don't forget that the patient in the next bed may be far sicker than you; be considerate of him or her. If your visitors are too many or too loud, the nurse or hospital-services manager may ask them to leave or to quiet their noise. Your doctor may further restrict the number of visitors and the length of their stay if he believes it to be necessary. Visitors should not bring in any food or beverages for you without your physician's approval.

You may find that visitors tire you more than you expected. Do not hesitate to tell them you feel fatigued and

ask them to leave; you are not expected to be a host while you are a patient. If you would be more comfortable having the nursing staff ask them to leave, you may arrange it that way. If you want us to restrict your visitors to a limited group, please let us know.

Visiting hours are set to permit much of your care to be accomplished without interruption before visitors arrive, and then to permit evening nursing care to take place at a reasonable time once the visitors have left. Visiting hours are as follows:

. . .

Since children are frequently the carriers of contagious disease, children under 13 years of age are not usually permitted to visit patient areas of the Hospital. However, arrangements may be made for your children to visit you under certain circumstances. In all cases, the decision to relax visting hours and rules is made only by the nurse in charge of your unit.

. . .

Coffee Shop and Cafeteria: The coffee shop, located behind the lobby on the second floor, is open to visitors 24 hours a day. The Hospital cafeteria is open to visitors for breakfast (6:30 a.m. to 9:00 a.m.), for lunch (11:00 a.m. to 1:30 p.m.), and for dinner (4:00 p.m. to 6:30 p.m.). The Children's Inn, close by on Longwood Avenue, has a public restaurant and can also provide accommodations for out-of-town visitors.

. . .

About Beth Israel

Beth Israel Hospital was established by the Boston Jewish Community in 1916 as a voluntary hospital to provide medical and hospital services for the sick and disabled of every race, color and creed, and to carry on educational

and scientific activities that promote effective patient care. From a small community facility, Beth Israel has grown to become a major university hospital affiliated with Harvard Medical School, nationally known both for patient care and for leadership in medical education and research.

Today, the Hospital, which has 374 beds and 62 bassinets, treats more than 16,000 inpatients and handles 120,000 outpatient and Emergency Unit visits every year. Nearly 2,750 doctors, nurses, other employees with a broad variety of skills, volunteers, and students participate in the work of health care at B. I. Some 1,200 people receive all or part of their professional education here each year through Beth Israel's affiliations with many of the Boston area's universities and colleges. All of these people are dedicated to fulfilling the goal of the Hospital's founders by providing the best possible health care for you, the patient.

Joint Exhibit 25A.

Beth Israel Hospital
Boston, Mass. 02215

Memorandum

To: M. Ames M.A. Date: April 15, 1975

From: L. Jacoby L.J.

Attached are the results of the survey made on April 7, 8 and 9 on the usage of the Cafeteria.
The data from the survey should be helpful in our developing alternate plans for feeding of employees during the period of time when the Cafeteria will be undergoing renovation.

As you can see, the Cafeteria is used by outsiders at each meal, of which the most heavy usage is in the evening.

LH

To: A. Cronin

Survey of Usage of Cafeteria April 7, 8 and 9, 1975

	Monday			Tuesday			Wednesday			Percentage of All Meals
	B	L	D	B	L	D	B	L	D	
B.I. & Harvard Employees	385	716	149	371	708	167	355	659	153	77.00%
Patients	12	2	6	9	4	5	13	13	10	1.56%
Visitors	16	35	68	13	77	73	16	61	69	9.00%
Students	35	88	8	33	72	9	35	66	12	7.52%
Volunteers	4	35	10	4	24	7	3	36	7	2.73%
Attending Physicians	8	11	1	8	3	5	3	3	3	.95%
P.D. Nurses	4	0	6	4	4	0	0	0	0	.38%
Women's Aux.	1	3	0	1	1	0	0	0	0	.13%
Construction Workers	10	2	0	13	0	0	7	1	0	.69%
Sales Rep.	0	0	0	0	2	0	0	0	0	.04%
Total	475	892	248	456	895	266	432	839	254	100.00%

Percentage of Non-Employees Using Cafeteria
April 7, 8, 9, 1975

Total Meals Served	4757	
Meals Served to Employees	3663	
Meals Served to Outsiders	1094	23.0%
Total Breakfasts Served	1363	
Breakfasts Served to Employees	1111	
Breakfasts Served to Outsiders	252	18.5%

Total Lunches Served	2626	
Lunches Served to Employees	2083	
Lunches Served to Outsiders	543	20.7%
Total Dinners Served	768	
Dinners Served to Employees	469	
Dinners Served to Outsiders	299	38.9%
Total Monday Meals	1615	
Monday Meals Served to Employees	1250	
Monday Meals Served to Outsiders	365	22.6%
Total Tuesday Meals	1617	
Tuesday Meals Served to Employees	1246	
Tuesday Meals Served to Outsiders	371	22.9%
Total Wednesday Meals	1525	
Wednesday Meals Served to Employees	1167	
Wednesday Meals Served to Outsiders	358	23.5%

Percentage of Patients and Visitors Served

Monday	Breakfast	5.9%
	Lunch	4.1%
	Dinner	29.8%
Tuesday	Breakfast	4.8%
	Lunch	9.1%
	Dinner	29.3%
Wednesday	Breakfast	6.7%
	Lunch	8.8%
	Dinner	31.1%

Joint Exhibit 27B.

Newsletter from General Director — 23 January 1975.

The new edition of our statement on patients' rights is just off the presses. It is in blue-green ink this time. If you haven't read it in a while, please do so. And remember that the real challenge is to convert the ink and paper into an institutional life style. It takes all of us to do so, including you.

Joint Exhibit 28E.

Newsletter from the General Director—8 August 1974.

. . .

Of late, a few paper signs and notices have been taped to walls and doors about the Hospital. Please note that bulletin boards exist for that purpose. Signs should be kept off walls, windows and doors. . . .

Joint Exhibit 29B.

Newsletter from the General Director—17 October 1974.

Enrollment in the new Credit Union will begin during the week of 28 October - 1 November. A registration table will be set up outside the North entrance of the cafeteria during meal hours, to assist Beth Israel employees who wish to do so to join the Credit Union. Any questions you may have about the Credit Union itself, or details on how to arrange for regular savings through payroll deductions, when new members will be eligible to apply for loans, etc., will be answered at that time.

Please be sure to have your Beth Israel identification card with you if you wish to enroll in the Credit Union. . . .

Joint Exhibit 31.

Locker Room with Sanitary Facilities.

No. of Locker	Sex	Location	Occupied by
II 35	Male	E-B01 with bathroom Employee only	Laundry and Respiratory Personnel
II 22	Female	L-B36 with bathroom and lounge Employee only	Laundry Personnel
II 44	Male	L-B27 with bathroom shower and lounge Employee only In Maintenance Shop - Locked at 3:45	Maintenance Personnel
II 7	Mixed	S-V01 with shelves of supplies Employees only	Pharmacy Personnel
II 9	Female	R-354 with shelves of supplies Employee only	Bacteriology Personnel
IV 16	Mixed	X-Ray c/Lounge Employee only	X-Ray Personnel
IV 22	Female	X-Ray with bathroom	X-Ray Personnel
II 110	Male	SV-321 with bathroom shower and lounge Employee - Dr's.	Operating Room isolated from pt's area
II 84	Female	SV-325 with bathroom and lounge	Operating Room Nursing employees - isolated from pt's area

No. of Locker	Sex	Location	Occupied by
IV 28	Female	S-3281 conference with locker Room is separate	3 South Nurses pt. rooms on each side
II 2	Male	E-401 lockers and bed Employee service	Doctors East wing contains no patients here
II 18	Mixed	N-507 - Employee only	SICU Personnel
IV 28	Female	N-516 with sink and Conference Room is separate	5 North Nurses pt. rooms across corridor
IV 10	Male	S-531 with Conference table Room is separate	Doctors & Interns pt. rooms across corridor
I 114	Male	SB-07 Locker Room #1 - Large locker room with lounge area, showers, toilet Employees only Totally isolated	45 Male Dietary 6 Storeroom 33 Transportation 6 Housekeeping 5 Nursing 6 Security Guards 1 Photography 2 Volunteers 10 Pharmacy
I 159	Female	SB-16 Locker Rm #2 large room with chairs & toilet facilities Employees only Totally isolated	46 Housekeeping 7 Nursing 7 Mailroom 4 CSR 1 Laundry 1 Transportation 58 Dietary 13 Empty

No. of Locker	Sex	Location	Occupied by
I 249	Female	SB-18 Locker Rm #3 large room with chairs & toilet facilties Employees only Totally isolated	25 Dietary 3 CSR 1 Laundry 9 Hospital Services 2 Mailroom 29 Housekeeping 105 Nursing 1 Anesthesia 1 Dr. Deykin Lab 1 Photography 8 Pharmacy 64 Empty
I 85	Male	SB-09 Locker Rm #4 large room with lounge & toilet facilities Employees only Totally isolated	56 Housekeeping 4 Volunteers 1 Chemistry 1 Operating Room 1 Security Guard 2 Nursing 3 Hospital Svs. Mgt. 1 CSR 2 Storeroom 8 Transportation 6 Empty

All locker rooms have doors closing off all outside areas.

Quan.		Sex	Location	Department	Occupied by
III	15 outpatients walk thru area	U	Yamins bsmt. cor.		Technicians
III	4 under stairs - out of path of patients	U	Yamins bsmt. stair well		Technicians
IV	15 Employees only	M	Yamins Y-104		Technicians
III	5 office area - no patients or visitors	U	Yamins 4th fl. cor. Y-416	Business only	Technicians
I	4 Employees only	U	L Bldg. L-238		Technicians
I	1 Employees only	U	L Bldg. L-242		Technicians
III	27 outpatients pass thru corridor	U	L Bldg. bsmnt. cor. LB-37		
II	22 Employee (Room) only	F	L Bldg. LB-36		
III	19 Lab area - no patients or visitors	U	L Bldg. L1-cor. L-179	(medical personnel)	
I	18 Pathology area - no pt's or visitors	F	E Bldg. E-119	(medical personnel)	
II	35 Employee only	M	E Bldg. E-B01		

Quan.		Sex	Location	Department	Occupied by
III	9 Special procedure - pt's pass here	U	L Bldg. L-2 cor. L-219	under anaesthesia	
IV	8 Employee only	M	L Bldg. L-334B		Technicians
IV	15 Employee only	M	L Bldg. L-320		Technicians
IV	11 Employee only	F	L Bldg. L-303		Technicians
IV	4 Employee only	M	L Bldg. L-424		Technicians
IV	6 Employee only	F	L Bldg. L-422		Technicians
IV	14 Hosp. Personnel only	U	E Bldg. Radiology File Room	Radiology	Technicians
II	35 Employees only - isolated	U	E Bldg. Locker Area	Radiology	Technicians
III	5 patient lockers	M	E Bldg. Patient dressing Area	Radiology	Patients
III	7 patient lockers	F	E Bldg. Patient dressing Area	Radiology	Patients
III	6 outpt's pass thru	U	OPD-basement cor. OB-03		Housekeeping
III	16 outpt's pass thru	U	OPD-basement cor. OB-26B		Housekeeping

Quan.		Sex	Location	Department	Occupied by
II 2		U	Rabb 4 Waiting Area pt's only	Clinic area	Patients
II 8		U	Rabb 4 R-417 pt's only	Room is isolated for	Patients
III 6	outpt's (Blood Donors)	U	Rabb 3 R-340B pass thru		Technician
II 9		U	Rabb 3 R-354 separate room		Technician
II 31	Employee corridor	U	Gryzsmish Bldg. cor. N-307 - in corridor		Technician
V 15	Employee only	U	Emer. Ward N-106C	small foot lockers	Nurses
V 18	Employee only	U	OPD-3 0-302	Dental small foot lockers	Technician
IV 5	Employee only	U	South Bldg. 8 So.	Dieticians office small foot lockers	Dietician pt's outside area
III 4	C.R.C.	U	North Bldg. N-812	8 No. Med. Res. Unit	Patients isolated
III 2	pt's only	F	North Bldg. N-807	OBS Patient Rm.	Patients

Quan.		Sex	Location	Department	Occupied by
II 6	Employee only	F	South Bldg. S-831	OBS (2 of 6 are for del. uniforms)	Nurses
II 10	Employee only	M	South Bldg. S-829	OBS isolated	Doctors
II 4	Employee only	M	South Bldg. S-829A	OBS isolated	Doctors
III 27		Mixed	LB corridor by Material Services	Visitors and employees may pass thru — no patients	Drs. & Lab. Technicians
III 31		Mixed	North corridor by Hematology	Employee only area	Hematology, chemistry

Sex Code — M = Male
F = Female
U = Undetermined
Department — no listing — unable to determine
Occupied by — no listing — unable to determine

Lockers that are confined to Nursing Stations

No. of Locker		Sex	Location	Occupied By
II 18	separate room Hand bags	Female	S-4353 small lockers	4 South Nurses off solarium
II 10	separate room	Male	S-431 small lockers	4 South Dr.'s & Interns
IV 10	separate room across from N. Station	Female	N-416 small lockers conference	4 North Nurses
II 18	separate room	Female	S-5353 small lockers	5 South Nurses off solarium
II 10	separate room	Mixed	S-6286 small lockers	6 floor Dr.'s & Interns
II 18	separate room	Female	S-6333 small lockers	6 South Nurses off solarium
II 10	separate room	Female	S-722	OBS/Gyn Resident Quarter

Joint Exhibit 32.

Newsletter from the General Director — 30 May 1974.

The spring fund drive for the Combined Jewish Philanthropies is under way. One of the major beneficiaries of CJP funds in this country is Beth Israel Hospital and abroad, of course, it is the social and rehabilitative programs of the State of Israel. Please help as generously as you can. You may use payroll deduction if you wish. . . .

Respondent's Exhibit 2.

Newsletter from the General Director — 20 September 1975.

. . .

The second edition of our statement, "Your Rights as a Patient at Beth Israel Hospital, Boston" has just been published. It is the same color as the earlier edition but states on the back page, "Printed August 1972; 2nd Edition, August 1973." The major change has been addition of a statement that the patient has the "right to request and receive consultation" on his medical condition. Following the appearance of our first edition, the American Hospital Association came up with its own version and urged all 7000 hospitals of this country to follow the example we set at Beth Israel. We have received over 1000 inquiries about patients' rights from all over the world. Even more important is the fact that comments by our own patients indicate that the concept of patients' rights at Beth Israel is more than printed words on paper. Patients' rights are put into meaningful action by Hospital employees, students, volunteers and staff physicians and dentists — another example of the special qualities of Beth Israel that make it one of the finest hospitals in the country. . . .

Respondent's Exhibit 3(a).

29 July 1971

Dear Doctor:

WORDS — CONTENT — FORM — these banners have carried us to the problem-oriented record and, from perusal of charts throughout the House, we are making headway in more lucid documentary on and thinking about the patient's distress.

Less attention is paid to form and content of other words we scatter about the Hospital. Unlike our output for the medical record, these words are often ingenuous yet more public and readily overheard, inevitably subject to misrepresentation. I refer to the casual conversation in the corridor or elevator, in the lobby or cafeteria line. More than once a visitor has been privy involuntarily to a conversation or fragment of commentary he is apt to appropriate as having relevance to the patient he is visiting. The effect can be devastating. Even our conventional jargon can be desperately unsettling when overheard, or involuntarily deprive a patient of a measure of privacy he should enjoy.

"Form" as opposed to "content" pertains in part to decibels. Recent mail from patients brings a disturbing rise in complaints of noise. The blaring TV set and the loud visitor, both still present and annoying (and too often unchallenged by us on our daily routines) have given way to jarring conversation within rounding conclaves of physicians and students and to loud commentaries between nursing floor personnel as the major sources of noise that oppress the patient.

Collectively, we say too much too loudly and we listen too little. Pause and really listen a moment here and there throughout the day and night.

In general, we tend not to harp on decorum for its own sake, nor for support of an outmoded image of the healer's role. "Decorum" refers to behavior which is seemly or suitable. In the environment of the ill and their concerned families, certain aspects of behavior are indeed more suitable and worth cultivation, simply to get on with the tasks at hand. Since we all lapse, inevitably, we should, when needed, take or give a gentle reminder on the art in medicine with the same openness and generosity that we share for its science. . . .

Respondent's Exhibit 3(b).

Newsletter from the General Director — 30 September 1971.

. . .

Here is a letter I received from a recent patient . . . .

I overheard the medical conversations of a team of house doctors outside my room the other day. Although technical medical terms were being used, it seemed obvious that their animated conversation concerned the condition of patients in what I took to be adjacent rooms on the floor. As you no doubt know, noises seem to carry in those corridors. In fact, the acoustics are remarkable, probably second to Symphony Hall! The doctors probably had no idea that their discussion was being overheard — possibly even by the very patients they were discussing. It seems wrong to be so free with conversation, even though no harm is clearly intended. What of the poor patient hearing himself discussed? It seems to me that something should be done to the acoustical quality of the corridors as well as reminding the doctors not to share their patients' secrets. . . .

Respondent's Exhibit 3(c).

19 July 1973

Dear Doctor:

. . .

Among the rights of patients we insist upon is the right to privacy. This includes not only the reassurance of privacy in the process of history-taking and physical examination and restriction of access to the information obtained thereby, but equivalent discretion to be exercised in the discussion of such privileged information among physician colleagues. Patients and visitors are often horrified to overhear — in elevators, cafeteria lines, nursing unit corridors and stairwells — what is to the engrossed clinician innocuous professional discussion. And when patients' names are mentioned or gratuitous commentaries added, the error is compounded manyfold. Please restrict the voicing of your clinical discussions to include none other than your intended audience....

Respondent's Exhibit 3(d).

17 October 1974

Dear Doctor:

. . .

Finally, I want to extract from a letter I received from one of our medical staff members:

> Recently, a patient of mine was in the hospital and a couple of physicians who were not concerned with her care told some of her friends at a social occasion of the specific nature of her surgery.

No further comment is needed, I believe. But it is important to remind ourselves also that we run such risks of indiscretion many times over within the walls of the Hospital through casual conversation in corridors, elevators,

cafeteria lines, and other areas of ready contact with public and patients. Even some of our more general medical conversations may well be chilling to the unsophisticated or casual ear. Please be mindful of the potiential impact of your comments.

Respondent's Exhibit 4.

Newsletter from the General Director — September 1972.

A new brochure is now available to our patients in the Clinics, Emergency Unit and on the inpatient floors. Titled, "Your Rights As A Patient at Beth Israel Hospital, Boston," it states simply some of the facts of which patients should be aware as they seek our help. The text will also serve as a gentle reminder to us of the stature, humanity and importance of our patients. About 30 persons from all segments of our Hospital community have helped in the editing. Your comments are invited.

Beth Israel Hospital, its doctors, nurses and entire staff are committed to assure you excellent care as our patient. It has always been our policy to respect your individuality and your dignity. This listing is published to be certain that you know of the long-standing rights that are yours as a Beth Israel patient.

1. You have the right to the best care medically indicated for your problem, that is, to the most appropriate treatment available without considerations such as race, color, religion, national origin or the source of payment for your care.

2. You have the right to be treated respectfully by others; to be addressed by your proper name and without undue familiarity; to be listened to when you have a question or desire more information and to receive an appropriate and helpful response.

3. You have the right to expect that your individuality will be respected and that differences in cultural and educational background will be taken into account.

4. You have the right to privacy. In the clinics, you should be able to talk with your doctor, nurse, other health worker or an administrative officer in private, and know that the information you supply will not be overheard nor given to others without your permission. In the Hospital, when you are in a semi-private room, you can expect a reasonable attempt to keep the conversation private. When you are examined, you are entitled to privacy — to have the curtains drawn, to know what role any observer may have in your care, to have any observers unrelated to your care leave if you so request. If you are hospitalized, no outsiders can see you without your permission. Your hospital records are private as well, and no person or agency beyond those caring for you can learn the information in your medical record without your specific permission.

5. You have the right to know the name of the doctor who is responsible for your care; to talk with that doctor and any others who give you care; to receive all the information necessary for you to understand your medical problems, the planned course of treatment (including a full explanation about each day's procedures and tests) and the prognosis or medical outlook for your future; to receive adequate instruction in self-care, prevention of disability and maintenance of health. You have the right to ask the doctor any questions that concern you about your health. You have the right to know who will perform a test or an operation, and the right to refuse it. Because this is a university hospital, you may come across doctors, nurses and other health workers in training, or you may be asked to participate in special studies. We believe that the presence of students adds to the quality of care. Nevertheless, you

have the right to have a full explanation of any research study or any training program for students before you agree to participate in it, and the right to refuse to participate. If you agree to the diagnostic and therapeutic procedures recommended by your doctor, you may be asked to sign a consent form, but if you refuse, you have the right to receive the best help that the Hospital can still offer under the circumstances.

6. You have the right to leave the Hospital even if your doctors advise against it, unless you have certain infectious diseases which may influence the health of others, or if you are incapable of maintaining your own safety, as defined by law. If you do decide to leave before the doctors advise, the Hospital will not be responsible for any harm that this may cause you and you will be asked to sign a "Discharge Against Advice" form.

7. You have the right to inquire about the possibility of financial aid to help in the payment of your Hospital bills and the right to receive information and assistance in securing such aid.

Patients also have certain responsibilities which should be carried out in their own best interests:

Please keep appointments, or telephone the Hospital when you cannot keep a scheduled appointment; bring with you information about past illnesses, hospitalizations, medications and other matters relating to your health; be open and honest with us about instructions you receive concerning your health, that is, let us know immediately if you do not understand them or if you feel that the instructions are such that you cannot follow them.

You have the responsibility to be considerate of other patients, and to see that your visitors are considerate as well, particularly with reference to noise and smoking, which are usually very annoying to nearby patients.

You also have a responsibility to be prompt about payment of Hospital bills, to provide information necessary for insurance processing of your bills, and to be prompt about asking any questions you may have concerning your bills.

Beth Israel Hospital is interested in keeping you in the best health possible. If you feel you are not being treated fairly or properly, you have the right to discuss this with your doctor, nurse, unit manager, other health worker, or the Administrator-on-Call. You may also write a letter to the General Director, Beth Israel Hospital, Boston 02215. All correspondence will receive prompt and personal attention.

This message reflects the interest and philosophy of the entire staff of Beth Israel Hospital.

Concerned With Today's Illness and Tomorrow's Health.

/s/ Mitchell T. Rabkin
Mitchell T. Rabkin, M.D.
General Director

Notice — Writ of Certiorari Granted.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

January 16, 1978

Louis Chandler, Esq.
99 High Street
Boston, Massachusetts 02110

RE: Beth Israel Hospital v. National
Labor Relations Board, No. 77-152

Dear Mr. Chandler:

The Court today took the following action in the above case:

"The petition for a writ of certiorari is granted."

Enclosed are memorandums describing the time requirements and procedures under the Rules.

The additional docketing fee of $50, Rule 52(a), is due and payable.

Very truly yours,

MICHAEL RODAK, JR., Clerk
By /s/ June M. Hoffman
(Miss) June M. Hoffman
Assistant Clerk

Enclosures

No. 77-152

Supreme Court, U. S.
FILED
NOV 7 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

BETH ISRAEL HOSPITAL, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

CARL L. TAYLOR,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

LINDA SHER,
Assistant General Counsel,

DAVID F. ZORENSKY,
Attorney,
National Labor Relations Board,
Washington, D.C. 20570.

INDEX

Page

Opinions below 1

Jurisdiction 1

Question presented 1

Statute involved 2

Statement 2

Argument 6

Conclusion 11

CITATIONS

Cases:

Beth Israel Hospital, 228 NLRB No. 195, 95 LRRM 1087 7

Lutheran Hospital of Milwaukee Inc. v. *National Labor Relations Board*, C.A. 7, No. 76-1688, decided October 5, 1977 7

Republic Aviation Corp. v. *National Labor Relations Board*, 324 U.S. 793 8

St. John's Hospital and School of Nursing, Inc., 222 NLRB 1150 5

St. John's Hospital and School of Nursing, Inc. v. *National Labor Relations Board*, 557 F. 2d 1368 ..... 7, 10

Statutes:

National Labor Relations Act, 61 Stat. 136, 73 Stat. 519, 88 Stat. 395, as amended, 29 U.S.C. (and Supp. V) 151 *et seq.* 2

Section 7, 29 U.S.C. 157 6

Section 8(a)(1), 29 U.S.C. 158(a)(1) 5

Section 8(a)(3), 29 U.S.C. 158(a)(3) 5

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-152

BETH ISRAEL HOSPITAL, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 49-59) is reported at 554 F. 2d 477. The decision and order of the National Labor Relations Board (Pet. App. 21-47) are reported at 223 NLRB 1193.

JURISDICTION

The judgment of the court of appeals was entered on April 29, 1977. The petition for a writ of certiorari was filed on July 27, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the National Labor Relations Board properly concluded, on the facts of this case, that a hospital

violated Section 8(a)(1) and (3) of the National Labor Relations Act by issuing and maintaining no-solicitation/no-distribution rules that prohibit employees during non-working time from soliciting union support and distributing union literature in the hospital cafeteria and coffee shop.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C. (and Supp. V) 151, *et seq.*), are set forth at Pet. App. 19-20.

STATEMENT

A. This case arose when the Massachusetts Hospital Workers Union, Local 880, Service Employees International Union, AFL-CIO, filed with the National Labor Relations Board an unfair labor practice charge challenging the petitioner Hospital's no-solicitation/no-distribution rule as applied in its cafeteria and coffee shop (Pet. App. 24). The Board found the following facts:

Petitioner Beth Israel Hospital is a nonprofit health care institution which employs 2,200 persons excluding house staff, attending physicians, students, and employees of Harvard University who work on the premises (Pet. App. 25).[1]

In July 1974 the Hospital established the following rule restricting solicitation and distribution of literature on Hospital property (Pet. App. 28-29):

> Hospital employees who want to solicit other employees for the Union or other causes may do so

[1]The National Labor Relations Act was amended, effective August 25, 1974, to extend its coverage and protection to employees of nonprofit health care institutions. 88 Stat. 395.

> when they are not on their own working times, but only in two well-defined locations of the Hospital:
>
> 1) Employee-only areas—employee locker rooms and certain adjacent rest rooms; and
>
> 2) Cafeteria and coffee shop.
>
> In the locker areas literature may be offered. In the cafeteria and coffee shop, conversations may take place on a one-to-one basis but there is to be no setting up of special tables, public distribution of literature nor any form of coercion. Elsewhere within the Hospital, including patient-care and other work areas, the lobbies, corridors, elevators, libraries, meeting rooms, etc., there is to be no solicitation nor distribution of literature. Soliciting of patients and visitors is expressly prohibited at all times and places.

The Hospital's cafeteria and coffee shop, which are adjacent, are open to employees, patients, and visitors. They contain two serving lines and a number of vending machines, and have a combined seating capacity of approximately 300 persons. There is no employee-only eating facility in the Hospital. A study of cafeteria use conducted by the Hospital indicated that the employees purchased more than 75 percent of the meals served in the cafeteria and that the heaviest use by visitors was in the evening. Patient use of the cafeteria is relatively slight. (Pet. App. 39; JX 20, 25).[2]

The Hospital uses the cafeteria area for communication with the employees. Posters publicizing a Hospital cost reduction drive and charity campaigns have been placed

[2]"JX" refers to the joint exhibits introduced by the parties at the hearing before the Board.

in the area. There is a travel brochure rack and a table on which are placed commercial solicitations, such as brochures and applications for insurance programs, tennis camps and film processing. Upon occasion the Hospital has set up a table in the cafeteria to promote special campaigns. (Pet. App. 33, 39-41.)

While the rule was in effect,[3] employee Ann Schunior, a research technician, distributed a union newsletter in the cafeteria. On her lunch hour, she went from table to table and asked people she recognized or thought were employees whether they would like a copy of the union newsletter. When Schunior was in doubt as to someone's employee status, she first asked if he or she were an employee and explained that she was passing out literature for employees. (Pet. App. 29-32.) While distributing the newsletter Schunior was given a verbal warning by the Hospital's general director. Subsequently, she received a written notification that further violation would result in dismissal. (Pet. App. 32.)

B. The Administrative Law Judge concluded that the Hospital's restrictions on union solicitation and

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[3]After the unfair labor practice complaint in this case issued, the Hospital modified its rule to bar any solicitation or distribution of literature in any areas open to the public, including the cafeteria and coffee shop (Pet. App. 30).

On April 9, 1975, the unfair labor practice complaint was amended to encompass the Hospital's revised rule (Pet. 3).

Under the revised rule, solicitation, like distribution of literature, is totally prohibited in the cafeteria area and is limited to employee-only areas—"employee locker rooms and certain adjacent rest rooms" (Pet. App. 30). Lockers are scattered throughout the hospital in some 63 locations. However, there are only four large locker rooms plus two smaller rooms, containing 613 lockers, which are open to employees generally. In addition, there are locker areas containing 470 lockers which are available only to employees who are assigned

distribution of literature in the cafeteria and coffee shop violated Section 8(a)(1) of the Act, and that the Hospital also violated Section 8(a)(3) and (1), 29 U.S.C. 158(a)(3) and (1), by threatening employee Schunior with discharge if she continued to distribute literature in the cafeteria (Pet. App. 21, 42-43). He was (Pet. App. 42)

> not persuaded that the [Hospital] has offered any convincing evidence to demonstrate that the rule is needed, either by reason of actual or suspected interference with patients, visitors or non-employees. Thus, I am unable to find that the [Hospital] has made a sufficient showing of impairment with its principal obligation, namely, the care of patients, to justify the rule.

He found that the Hospital permitted solicitation in the cafeteria for non-union matters, and that there were no other places where employees could meet in the Hospital or in the nearby area to discuss non-work related matters (Pet. App. 40-42).

The Board upheld the Law Judge's conclusion, but also stated in a footnote, citing its intervening decision in *St. John's Hospital and School of Nursing, Inc.*, 222 NLRB 1150, that "the [Hospital] also violated Sec. 8(a)(1) by maintaining an overly broad no-solicitation, no-distribution rule that prohibited all solicitation and distribution in all areas to which patients and visitors have access and employees have access during non-working time other than immediate patient care areas" (Pet. App. 21-22 n. 2).[4]

---

lockers in those areas. The Hospital does not utilize the locker rooms and locker areas to communicate with its employees. (Pet. App. 38.)

[4]In *St. John's Hospital and School of Nursing, Inc., supra,* the Board held that no-solicitation rules are presumptively invalid in all

The Board's order required the Hospital to "[r]escind its written rule prohibiting distribution of union literature and union solicitation in its cafeteria and coffee shop," and to cease and desist from interfering "in any like or related manner" with its employees' rights under Section 7 of the National Labor Relations Act, 29 U.S.C. 157 (Pet. App. 22, 44-45).

C. The court of appeals affirmed (Pet. App. 49-59). It agreed with the Board that the Hospital had failed to establish special circumstances justifying its prohibition of employee solicitation and distribution in the cafeteria and coffee shop (Pet. App. 54-56). However, noting the absence of any record evidence pertaining to the impact of employee solicitation and distribution in other public areas, the court held that the Board's decision and order determined "no more than the status of the cafeteria and coffee shop" (Pet. App. 57-58). It therefore did not decide whether, under the Board's footnote citing *St. John's Hospital and School of Nursing, Inc., supra*, the Hospital rule was also invalid as applied to all other non-patient care areas and held that the Hospital was not collaterally estopped from further litigating the validity of its rule in other areas (Pet. App. 50).[5]

ARGUMENT

1. The broad issue which petitioner seeks to raise—*i.e.*, whether a hospital may properly bar employees from engaging in union solicitation and literature distribution

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public areas of hospitals other than immediate patient-care areas, to which patients, visitors, and employees have access.

[5]The court also refused to enforce the Board's broad cease and desist order on the ground that no proclivity to violate the Act had been shown (Pet. App. 58-59) .

in any areas of a hospital to which patients have access—is not presented here. Because the instant case had been tried prior to the Board's *St. John's* decision and there was no record evidence pertaining to the impact of employee solicitation and distribution in other areas of the Hospital, the court of appeals decided only that the Hospital's rule was invalid insofar as it sought to bar such employee activity in the cafeteria and coffee shop (Pet. App. 57-58). Accordingly, there is no conflict between the decision below and the Tenth Circuit's ruling in *St. John's Hospital and School of Nursing* v. *National Labor Relations Board*, 557 F. 2d 1368, which refused enforcement of a Board order holding invalid a hospital rule barring solicitation in all public areas of a hospital to which patients have access.[6] Cf. *Lutheran Hospital of Milwaukee Inc.* v. *National Labor Relations Board*, C.A. 7, No. 76-1688, decided October 5, 1977.

Moreover, review of the broader issue raised by petitioner would be inappropriate at this time in this case. The record is incomplete, and the Board has reopened a second proceeding involving the Hospital, in order to take additional evidence as to the application of the Hospital's no-solicitation/no-distribution rule in other areas of the Hospital accessible to patients, visitors, and employees.[7] If the Board's decision is adverse to the Hospital, petitioner will, at that time, be able to seek judicial review on a fully developed record.

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[6]The Board has decided not to seek review of the Tenth Circuit's decision in *St. John's*.

[7]On August 3, 1977, the Board issued an order remanding for further hearing a second case involving the Hospital's no-solicitation/no-distribution rule. *Beth Israel Hospital*, 228 NLRB No. 195, 95 LRRM 1087.

2. The only remaining question presented is whether the court of appeals properly sustained the Board's finding that the Hospital had not met its "burden * * * to show that special circumstances justified its curtailment of protected activities in [the cafeteria and coffee shop]" (Pet. App. 54). That question turns on the application of well-settled principles[8] to the facts of this particular case, and hence does not warrant further review. In any event, since the cafeteria and coffee shop were frequented mainly by employees and were open to a variety of other types of solicitation and distribution, the court of appeals correctly found that the Board's conclusion that the Hospital had to establish a special need for banning employee activity in these areas rested on a rational basis,[9] and that its determination is amply supported (Pet. App. 54-56):

> The hospital argues that solicitation and distribution activities among employees might "offend or upset

[8]As the court of appeals correctly noted (Pet. App. 53): "Principles governing an employer's limitation of solicitation and distribution by employee union organizers are by now fairly well settled. Rules which prohibit union solicitation on the employer's property during non-working time in any location have been held to be presumptively unreasonable and discriminatory in the absence of evidence of special circumstances to justify them. *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793, 804 * * *. Rules prohibiting distribution of literature are likewise said to be presumptively invalid if applied during non-working time in non-working areas."

[9]The court noted that the Board, finding that "a hospital's patient care function is * * * not * * * impaired by organizational activities in cafeterias and like areas [has] refused to apply to hospitals its precedents upholding no-solicitation rules when applied to non-working time activities of employees in department store sales floors and lunchrooms" (Pet. App. 54 n. 2). Recognizing that the detailed formulation of labor policy is the Board's responsibility, the court held that "[w]hile reasonable minds might differ as to the validity of such a distinction, we cannot say that the Board acted irrationally in

> patients and their visitors" gathered in the cafeteria and coffee shop, but the Board could conclude that such activities in these public areas would not constitute a sufficient threat to the treatment of patients, or to their recovery, to justify depriving employees of their organization rights. There was evidence of very substantial employee use of such areas, and the Board had to weigh the probable effect on ambulatory patients and visitors of employee solicitation and distribution activities in these natural gathering areas against the harm to employees of a ban. Beth Israel asserts that patients witnessing "table-hopping" and heated pro- and anti-union discussions will be subject to anxiety as they worry about "the security of their environment." But this assumes that irresponsible behavior will be the norm, and gives no weight to the fact that only ambulatory patients visit the cafeteria and coffee shop. We think the Board was entitled to reject this line of argument as unduly speculative. * * *
>
> Beth Israel argues that its no-distribution rule will prevent the union's "scurrilous" attacks on the hospital's health care from falling into the hands of patients or visitors. There was no evidence, however, that literature, offensive or otherwise, was distributed to patients or visitors. Employee Schunior testified that she took care to distribute only to employees. If in the future employee organizers deliberately distribute "scurrilous" literature to patients or visitors, the hospital may well have cause to discipline such employees. *Cf.* [*National Labor Relations Board*] v. *Local 1229, IBEW (Jefferson*

viewing hospital cafeterias differently, given the different factors affecting the different sorts of institutions, their employees, and their clientele" (*ibid.*).

> *Standard Broadcasting Co.*), 346 U.S. 464 (1953). In any event, the hospital cannot justify a rule prohibiting distribution to employees of all types of literature on the ground that some of the literature may be scurrilous. Such an argument might at most justify a rule directed at offensive literature. We conclude that the Board did not err in finding that the hospital had not justified its no-solicitation, no-distribution rule as it related to the cafeteria and coffee shop.[10]

Nor is review warranted because the Tenth Circuit, in *St. John's Hospital, supra*, rejected the distinction which the Board has drawn between hospital restaurants and those located in other types of establishments (note 9, *supra*), and refused to find that a ban on employee solicitation in the public cafeteria and gift shop there was unlawful. But see *Lutheran Hospital of Milwaukee Inc.* v. *National Labor Relations Board, supra*. Unlike the Hospital in this case, the institution in *St. John's* has an employee-only lunchroom and cafeteria which more than 80 percent of the employees used on a daily basis, and employee lounges and locker rooms open to all employees. 557 F. 2d at 1371. Noting these differences, the Tenth Circuit expressly found that "***Beth Israel*** is distinguishable from the present case in several respects * * *." *Id.* at 1375-1376 n. 7.

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[10]The court also rejected, as factually unsupported, the Hospital's contention that the union newsletter contained scurrilous subject matter which would upset patients (Pet. App. 55).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1977.

DOJ-1977-11

Supreme Court, U. S.
FILED
MAR 3 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States.

October Term, 1977.

77-

No. 152.

BETH ISRAEL HOSPITAL,

PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD,

RESPONDENT.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief for Beth Israel Hospital.

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Table of Contents.

Opinions Below 1

Court of Appeals for the First Circuit, 554 F. 2d 477, 95 LRRM 2230 (1977). Reproduced in Appendix C, Petition for Writ of Certiorari at page 49

National Labor Relations Board, 223 NLRB No. 188, 92 LRRM 1078 (1976). Reproduced in Appendix B, Petition for Writ of Certiorari at page 21

Jurisdiction 2

Statutes involved 2

Questions presented 3

Statement of the case 4

Summary of argument 6

Argument: 7

I. The Board's Decision Impedes the Hospital's Ability to Perform Its Primary Function of Providing Optimum Care to Its Patients 7

A. *The First Circuit Erred in Giving Deference to the Board's Decision Which Is Contrary to Congressional Purpose and Which Is Outside the Board's Area of Expertise* 8

B. *The Board Did Not Meet Its Burden of Proof Because of Its Failure to Articulate Persuasive Reasons for Its Decision, Which Was Not Supported by Substantial Evidence* 18

C. *Even Assuming that Petitioner Bears the Burden of Proof, Petitioner has Met Its Burden by Evidence of the Existence of Special Circumstances in the Cafeteria and Coffee Shop* 23

D. *Petitioner's No-Solicitation, No-Distribution Rule was Not Discriminatorily Applied* 35

E. *Ample Alternative Means of Communication Are Available to Employee Organizers* 36

F. *The Rule Is Not Reflective of Any Anti-Union Bias on the Part of Petitioner* 39

II. Even without Considering the Special Circumstances that Exist as a Result of a Hospital's Function in Providing Patient Care, No Rational Basis Exists for the Board's Disparate Treatment of a Hospital Cafeteria and a Non-Hospital Restaurant 41

A. *Even without an Expectation of Profit, Petitioner Has an Independently Valid Interest in Making Its Cafeteria as Pleasant as Possible to Enrich the Overall Quality of the Hospital Environment for Its Customers* 44

Conclusion 45

Addendum 46

Beth Israel Hospital, Cases Nos. 1-CA-11469, et seq. (Decision of Administrative Law Judge dated December 14, 1977) 46

Respondent's Motion to Correct Typographical Errors in Administrative Law Judge's Decision 51

Table of Authorities Cited.

Cases.

A.T. & S.F. Memorial Hospitals, 234 NLRB No. 65, 97 LRRM 1314 (1978) 14

Astronautic Corporation of America, 164 NLRB 623, 65 LRRM 1161 (1967) 36

Bankers Club, Inc., 218 NLRB 22, 89 LRRM 1812 (1975) 31, 32

Baylor University Medical Center v. NLRB, No. 76-1940 (D.C. Cir. February 14, 1978) 9, 11, 12, 15, 17, 20, 29, 30, 35, 36, 38, 42, 43, 44

Beth Israel Hospital, 223 NLRB No. 188, 92 LRRM 1078 (1976) 1, 5

Beth Israel Hospital, Cases Nos. 1-CA-11469, et seq. (Decision of Administrative Law Judge dated December 14, 1977) 5, 23, 25, 26, 29

Bonwit Teller v. NLRB, 197 F. 2d 640 (2d Cir. 1952) 37

Goldblatt Brothers, Inc., 77 NLRB 1262, 22 LRRM 1153 (1948) 31

Guyan Valley Hospital, Inc., 198 NLRB 107, 81 LRRM 1023 (1972) 14, 15

Lutheran Hospital of Milwaukee, Inc. v. NLRB, 564 F. 2d 208 (7th Cir. 1977) 23

Marriott Corp. (Childrens' Inn), 223 NLRB 978, 92 LRRM 1028 (1976) 31

Marshall Field & Co., 98 NLRB 88 (1952), enf. 200 F. 2d 375 (7th Cir. 1950) 24, 30

May Department Stores Co., 59 NLRB 976 (1944), enf. as mod., 154 F. 2d 533 (8th Cir. 1946), cert. denied, 329 U.S. 725 (1946) 30, 31

May Department Stores Co., 174 NLRB 770, 70 LRRM 1307 (1969) 36

McDonalds' Corp., 205 NLRB 404, 84 LRRM 1316 (1973) 32

NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956) 18, 37

NLRB v. Beth Israel Hospital, 554 F. 2d 477, 95 LRRM 2230 (1st Cir. 1977) 1, 6, 17, 30, 34, 41

NLRB v. Clark Photograph Co., 176 F. 2d 341 (3d Cir. 1949) 37

NLRB v. Summit Nursing Convalescent Home, 472 F. 2d 1380 (6th Cir. 1973), denying enf. to 196 NLRB 769 (1972) 16, 17

NLRB v. United Steelworkers of America, CIO, 357 U.S. 357 (1958) 37

Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945) 18

Rochester General Hospital, 234 NLRB No. 44 (1978) 36

St. John's Hospital and School of Nursing, Inc., 222 NLRB 1150, 91 LRRM 1333 (1976) 5, 11, 19, 45

St. John's Hospital & School of Nursing, Inc., v. NLRB, 557 F. 2d 1368 (10th Cir. 1977), denying enf. to 222 NLRB 1150, 91 LRRM 1333 (1976) 8, 9, 13, 14, 20, 21, 22, 33, 37, 38, 42

Seng Co., 210 NLRB 936, 86 LRRM 1372 (1974) 19

Stoddard-Quirk Manufacturing Co., 138 NLRB 615, 51 LRRM 1110 (1962) 19

Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) 21

STATUTES.

61 Stat. 136, 73 Stat. 519, 29 U.S.C. §§ 151 et seq. 2, 3, 4, 14

28 U.S.C. § 1254 2

28 U.S.C. § 2112 6

29 U.S.C. § 152(2)(14) 10

29 U.S.C. § 157 3

29 U.S.C. § 158(a)(1) 3, 4, 5, 18

§ 158(a)(3) 3, 4

§ 158(b)(1) 18

Pub. Law No. 93-360, 93rd Cong., 2d Sess. (July 26, 1974), 88 Stat. 395 10

MISCELLANEOUS.

Hearings on H.R. 11357 Before a Subcommittee of the House Committee on Education and Labor, 92nd Cong., 1st and 2nd Sess. (1972) 10

Hearings on H.R. 11357 Before a Subcommittee of the Senate Committee on Labor and Public Welfare, 92nd Cong. 2d Sess. (1972) 10

Legislative History of the Coverage of Nonprofit Hospitals Under the National Labor Relations Act, 1974, Pub. L. 93-360 (S. 3203), prepared by the Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate 10, 11, 15

S. Rep. No. 93-766, 93rd Cong., 2nd Sess. reported in 1974, 2 U.S. Code & Admin. News 3946 11

IN THE

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October Term, 1977.

No. 152.

BETH ISRAEL HOSPITAL,
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v.
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RESPONDENT.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief for Beth Israel Hospital.

Opinions Below.

The opinion of the Court of Appeals for the First Circuit is reported at 554 F. 2d 477, 95 LRRM 2230 (1977). (The opinion of the First Circuit is reproduced in Appendix C of the petition for a writ of certiorari filed in this case.) The opinion of the National Labor Relations Board is reported at 223 NLRB No. 188, 92 LRRM 1078 (1976). (The opinion of the Board is contained in Appendix B of said petition.)

Jurisdiction.

The judgment of the Court of Appeals for the First Circuit was entered on April 29, 1977. On July 27, 1977, Beth Israel Hospital filed its petition for a writ of certiorari which was granted on January 16, 1978. The jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1254(1).

Statutes Involved.

The relevant statutes are the pertinent parts of sections two, seven and eight of the *National Labor Relations Act*, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. §§ 151, *et seq.* The language of those sections as of the dates involved in this case provided:

United States Code, Title 29:

§ 152 — Definitions.

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

. . .

(14) The term "health care institution" shall include any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm, or aged person.

§ 157 — Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

§ 158 — Unfair Labor Practices.

(a) It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 157 of this title . . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

Questions Presented.

I. Whether the National Labor Relations Board can continue to adhere to a policy regarding solicitation and distribution in a hospital setting which unduly ignores the rights of the hospital and the well-being of hospital patients.

II. Whether the NLRB erred by invalidating a hospital's no-solicitation, no-distribution rule as applied to its cafe-

teria and coffeeshop — areas where patients, visitors and employees intermingle.

Statement of the Case.

Beth Israel Hospital (hereinafter referred to as the "Petitioner" or the "Hospital") is a nonproprietary hospital located at 330 Brookline Avenue, Boston, Massachusetts. It is an employer within the meaning of the *National Labor Relations Act* (hereinafter referred to as the "Act"). The Petitioner employs approximately 2,200 employees excluding house staff, attending physicians, students and Harvard employees who work on the premises.

On October 29, 1974, an unfair labor practice charge was filed against Petitioner by Massachusetts Hospital Workers Union, Local 880, Service Employees International Union, AFL-CIO (hereinafter referred to as the "Union"), a labor organization within the meaning of the Act.

The complaint, dated February 21, 1975, charged the Hospital with violating section 8(a)(1) of the Act (29 U.S.C. §§ 158(a)(1) *et seq.*) by initiating, promulgating and maintaining a written rule prohibiting distribution of union literature and solicitation except on a "one-to-one" basis in the facility's cafeteria and coffee shop; and sections 8(a)(1) and 8(a)(3) by issuing oral and written warnings to employee Ann Schunior and threatening her with dismissal if she continued to distribute literature in the cafeteria of the Hospital. The Petitioner denied that it had engaged in conduct violative of the Act. Subsequently, the Hospital, in order to obtain from the Board a complete delineation of the parameters for no-solicitation and no-distribution rules in public areas of a non-proprietary hospital, modified its rules to also prohibit "one-to-one" solicitation. On April 9, 1975, the complaint was amended

by the Board to charge the Hospital with a further violation by virtue of its modified rule.[1]

Following a hearing, the Administrative Law Judge ruled that the Hospital's no-solicitation and no-distribution rules violated the Act. The Hospital filed exceptions to his decision. The Board affirmed the decision and order of the Administrative Law Judge. 223 NLRB No. 188, 92 LRRM 1078 (1976).[2]

Upon the Board's petition for enforcement, the United States Court of Appeals for the First Circuit under the

[1] The no-distribution, no-solicitation rules in effect at the time of the hearing before the Administrative Law Judge read as follows:

> There is to be no soliciting of the general public (patients, visitors) on Hospital property. Soliciting and the distribution of literature to Beth Israel employees may be done by other Beth Israel employees when neither individual is on his or her working time, in employee-only areas — employee locker rooms and certain adjacent rest rooms.
>
> Elsewhere within the Hospital, including patient-care and all other work areas open to the public such as the lobbies, cafeteria and coffee shop, corridors, elevators, gift shop, etc., there is to be no solicitation nor distribution of literature.
>
> Solicitation or distribution of literature on Hospital property by *non-employees* is expressly prohibited at all times.
>
> Consistent with our long-standing practices, the annual appeal campaigns of the United Fund and of the Combined Jewish Philanthropies for voluntary charitable gifts will continue to be carried out by the Hospital.

[2] The Board found that Petitioner had committed an additional section 8(a)(1) violation by maintaining an overly broad no-solicitation, no-distribution rule prohibiting all solicitation and distribution in all areas to which patients, employees and visitors have access during non-working time other than *immediate patient care areas*. The Board cited its own decision in *St. John's Hospital and School of Nursing, Inc.*, 222 NLRB 1150, 91 LRRM 1333 (1976), decided subsequent to the Administrative Law Judge's decision in the case at bar, as authority for this conclusion.

authority of 28 U.S.C. § 2112 enforced the Board's order. *NLRB v. Beth Israel Hospital*, 554 F. 2d 477 (1st Cir. 1977), as to the cafeteria and coffee shop, but refused to permit the Board to extend its decision to other patient access areas without affording the parties an opportunity to litigate fully the question as it pertains to those other areas.[3]

Summary of Argument.

The Court of Appeals erred in granting enforcement to the Board's order in this case. The Court gave undue deference to the decision of an administrative agency which, in this instance, is acting both in disregard of the declared intention of Congress and outside its area of expertise. When it granted the National Labor Relations Board jurisdiction over non-proprietory health care facilities, Congress intended that special concern be shown for the needs of hospital patients. The Board has not accorded due weight to the unique considerations inherent in health care institutions which must act in consonance with the needs of their patients as those needs are perceived by those who possess the medical expertise which the Board lacks.

The Court of Appeals failed to require that the Board meet its burden of proof by articulating valid reasons for refusing to find that the special circumstances inherent in a hospital setting pertain to all patient care-patient access areas of the Hospital including the cafeteria. The Board cited no record evidence sufficient to support its decision. On the other hand, Petitioner clearly demonstrated that there do exist special circumstances which validate its rule. Union solicitation and distribution of literature has the po-

[3] Petitioner wishes to point out to the Court that after the events which gave rise to this litigation, substantial renovation work has been completed at Beth Israel Hospital. As a consequence of that renovation, the coffee shop has been eliminated.

tential to upset patients and/or their visitors wherever they are present and this is sufficient justification for the Hospital's ban on such activity in all patient and visitor access areas including the Hospital's cafeteria. In deciding that enforcement of such a ban violates the Act, the Board has shown a lesser regard for the well-being of hospital patients than it has for customers of a retail store or for diners in a restaurant.

Petitioner's rules regarding solicitation and distribution were not discriminatorily applied. Nor do they reflect any anti-union animus on the part of the Hospital, which has provided ample means of communication to employee organizers.

The Court of Appeals also erred in failing to consider the fact that Petitioner's cafeteria and coffee shop are commercial restaurant facilities. There is no reason why such facilities should not be viewed at least equally, nor why their customers should be afforded less protection from potentially upsetting elements because they happen to be sick persons or concerned visitors. Rather, a policy far different from that embraced by the Board in this case must be adopted so that the will of Congress can be given effect.

Argument.

I. The Board's Decision Impedes the Hospital's Ability to Perform Its Primary Function of Providing Optimum Care to Its Patients.

Hospitals, by the very nature of their primary function, must provide a therapeutic environment for their patients. The decision of the Board, enforced by the First Circuit, has impaired the ability of the Hospital to provide complete medical care and has infringed upon the

rights of innocent third parties. It is left to this Court to formulate guidelines to govern the question of solicitation and distribution of union literature in a hospital and its environs so as to insure that the rights of those innocent third parties, hospital patients, are protected.

A. *The First Circuit Erred in Giving Deference to the Board's Decision Which Is Contrary to Congressional Purpose and Which Is Outside the Board's Area of Expertise.*

Although the Court of Appeals for the First Circuit pointed out that it has limited power of judicial review of a decision of an administrative agency, it erred by overemphasizing the constraints upon its authority. It would make little sense to provide for review of the decisions of administrative tribunals if reviewing courts are to be bound to give force to those decisions even where, as here, they are unsupported by either Congressional policy, agency expertise, or record evidence. In refusing to enforce the National Labor Relations Board order in the very case which established Board doctrine on the matter which is now before this Court, the Tenth Circuit pointed out that:

> Since the intermingling of patients and employees in patient access areas of the Hospital, even under the Board's rationale, is a "special circumstance" operating to dispel the presumption of illegality associated with restrictions on solicitation during working time, we are not required "to stand aside and rubber stamp" the "balance" struck by the Board in allowing solicitation in some patient access areas but not others. Rather it is our duty to review this balance to determine whether the accommodation reached by the Board is reasonable in light of expressed con-

> gressional policy and the commonly accepted circumstances attending modern hospital care.

St. John's Hospital and School of Nursing, Inc. v. NLRB, 557 F. 2d 1368, 1373-74 (10th Cir. 1977), *denying enf. to* 222 NLRB 1150, 91 LRRM 1333 (1976).

In a very recent and as yet unpublished decision, the District of Columbia Circuit in *Baylor University Medical Center v. NLRB*, No. 76-1940 (D.C. Cir. February 14, 1978), stated its view that:

> In reviewing an order by the NLRB, courts must accept its determinations if they are supported by "substantial evidence," and give considerable deference to the Board's interpretation of the terms of the NLRA. In this case, however, we find that the Board's decision is both contrary to congressional purpose and outside the Board's area of expertise, and accordingly entitled to little of the deference traditionally accorded to NLRB actions. While we are not at liberty to deny enforcement to an order of the Board merely because we would have favored a different result, we feel no hesitation in denying enforcement to the instant order.

Id. at 6-7 (footnotes omitted).

The case at bar, in which the Board is attempting to enforce the doctrine rejected upon review by the *St. John's* and *Baylor* courts, presents the same circumstances which justified those courts in refusing to rubber stamp the Board's view. The First Circuit should have acted in a similarly responsible manner in fulfilling its duty to correct administrative error.

First, it must be noted that the policy of the Board in formulating solicitation and distribution rules which focuses solely on the needs of employer and employees, giving

little heed to the right of sick persons to obtain quality health care provided in accordance with sound medical judgment, is contrary to Congressional intent. The Board's decision, enforced by the First Circuit, represents an abandonment of the responsibilities conferred upon the Board by Congress when it extended the coverage of the Act to employees of non-proprietary health care institutions in 1974. Pub. L. No. 93-360, 93d Cong. 2d Sess. (July 26, 1974), 29 U.S.C. § 152(2) and (14). Congress, in enacting the 1974 Health Care Amendments, acted not only in recognition of the interests of hospital employees. It is clear that Congress was also concerned with patients' well-being in a health care institution. This is made plain by examination of the Act itself and of the relevant legislative history. *See, e.g.,* Legislative History of the Coverage of Nonprofit Hospitals Under the National Labor Relations Act, 1974 (hereafter "Legislative History"), Pub. L. No. 93-360 (S. 3203), prepared by the Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, pp. 10, 13. *See generally,* Hearings on H.R. 11357 Before a Subcomm. of the Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess. (1972); Hearings on H.R. 11357 Before a Subcomm. of the House Comm. on Educ. and Labor, 92d Cong., 1st and 2d Sess. (1972).

The following comments in the legislative history of Public Law 93-360 confirm the overriding Congressional concern that the self-organizational activities of health care employees not be allowed to "disrupt the continuity of patient care":

> In the Committee's deliberation on this measure it was recognized that the needs of patients in health care institutions required special consideration in the

> Act. . . . S. Rep. No. 93-766, Legislative History, p. 11.
>
> Many of the witnesses before the Committee, including both the employee and the employer witnesses, stressed the uniqueness of health care institutions. *There was a recognized concern for the need to avoid disruption of patient care* **wherever** *possible.*
>
> It was this sensitivity to the need for continuity of patient care that led the Committee to adopt amendments with regard to notice requirements and other procedures related to potential strikes and picketing. S. Rep. No. 93-766, 93rd Cong., 2nd Sess. reported in 1974, 2 U.S. Code & Admin. News, 3946, 3951 (emphasis supplied).

Congress allowed for organization and representation of health care employees only upon the expectation that the Board would take care to safeguard the rights and interests of patients. It is clear from the decisions of the Board in *St. John's Hospital & School of Nursing, Inc., supra,* and in other cases such as this one, decided in accord with *St. John's* that that expectation remains unfulfilled. By limiting the scope of rules barring solicitation and distribution to immediate patient care areas only, the Board has exhibited its lack of sensitivity to the special concerns involved in providing medical treatment.

The District of Columbia Circuit in *Baylor University Medical Center v. NLRB, supra,* recognized that this abandonment of the responsibilities placed upon the Board by Congress mandates that a reviewing court refuse to give effect to irresponsible action. That court noted that:

> The legislative history of the NLRA as it applies to voluntary, non-profit hospitals reveals an unmistakable solicitude for the peaceful functioning of these

institutions, even at some expense to employees' right to organize. It was not until 1974 that such institutions—which employ some 55% of all hospital workers—were included within the NLRA, and in the course of amending the scope of the Act's coverage Congress clearly evinced its belief that these facilities presented special problems which mandated a different approach to the application of the NLRA than that taken in other fields.

Id. at 7-8. (footnotes omitted.) The court also reasoned that:

> . . . the clear expressions of congressional concern for avoiding disruptions in the hospital environment that we do find in the legislative history encourages us to give special weight to the needs of patients in striking a balance between preventing possible sources of disruptions in hospitals and protecting employees' right to organize. Moreover, it seems clearly preferable in resolving any doubts as to how best to accommodate these conflicting interests to err on the side of protecting the patients—to whom irreparable injury might be done—rather than on that of a labor organization which can at worst suffer a brief, albeit unjustified delay.

Id. at 8-9 (footnotes omitted).

A second factor disregarded by the First Circuit is that in dealing with issues involving sick persons and the environment in which they are to receive treatment, the Board is operating outside of its own area of expertise. In cases such as the instant case involving solicitation and distribution, the Board is attempting to apply standards which were developed for industry to the non-industrial setting of the nonprofit medical care facility. The Board is mistaken in that attempt, for a health care institution is a special

type of employer, one to which rules geared to application in an industrial setting cannot be mechanically applied. It is important to consider, and Congress intended that the Board consider, that the health care "industry" is different from other industries with which the Board is more accustomed to dealing. When it extended the jurisdiction of the NLRB to encompass nonproprietary health care institutions, Congress expected that the agency would develop rules especially tailored to govern employee organization in the unique setting of a hospital. Contrary to the views expressed by the Board and by the First Circuit in this case, it was not expected that the Board would merely resort to an unthinking application of "well-settled" doctrines developed in "industrial" life no matter how ill-suited those doctrines prove to be for the health care "industry."

Coupled with this failure to recognize that the unique nature of a hospital places it outside the scope of the traditional area of NLRB labor relations expertise is the Board's insistence on rendering decisions on matters which are essentially medical in nature without the slightest modicum of medical expertise, often without even the benefit of expert medical testimony. If an administrative agency is acting in regard to matters which lie outside the area of its expertise, then there is no mandate that a reviewing court defer to the decision of the agency. This premise was correctly perceived by the Tenth Circuit in deciding the *St. John's Hospital and School of Nursing* case, *supra,* as it said:

> We are therefore compelled to conclude that the ultimate factual inferences on which the Board's distinction was based were drawn not from the record evidence but rather from the Board's own perceptions of modern hospital care and the physical, mental, and emo-

tional conditions of hospital patients—areas outside the Board's acknowledged field of expertise in labor/management relations.

• • •

Since the intermingling of patients and employees in patient access areas of the Hospital, even under the Board's rationale, is a "special circumstance" operating to dispel the presumption of illegality associated with restrictions on solicitation during working time, we are not required "to stand aside and rubber stamp" the "balance" struck by the Board in allowing solicitation in some patient access areas but not others. Rather it is our duty to review this balance to determine whether the accommodation reached by the Board is reasonable in light of expressed congressional policy and the commonly accepted circumstances attending modern hospital care.

557 F. 2d at 1373-74.

There are numerous factors which demonstrate the Board's lack of expertise in this area.[4] One example is the Board's abandonment of the rule endorsed in *Guyan Valley Hospital, Inc.*, 198 NLRB 107, 81 LRRM 1023 (1972), which recognized a *tendency* to disturb patients as justification for the enforcement of a no-solicitation rule in public areas of a hospital. It should not go unnoticed that Congress, in extending the coverage of the *Act* to nonprofit hospitals, chose not to disturb the Board's handling of solicitation in the hospital setting as expressed in *Guyan Valley*. Thus, while it enacted special provisions

[4] For example, see *A.T. & S.F. Memorial Hospitals*, 234 NLRB No. 65, 97 LRRM 1314 (1978), where the Board reversed an Administrative Law Judge and found that "the no solicitation rule is invalid to the extent that it applies to the intensive care unit", which the Judge had found was both a working area of the hospital and an immediate patient care area.

on bargaining and bargaining units, strikes and picketing and directed the Board to give hospital cases priority handling, (S. Rep. No. 93-766, Legislative History, pages 11-14), it left untouched the Board's *Guyan Valley* doctrine governing hospital solicitation. This aspect of the Board's approach to regulation of organizational activity in nonprofit hospitals proved bothersome to the court in *Baylor University Medical Center* v. *N.L.R.B., supra,* which indicated its approval of the now-rejected Board doctrine by quoting from *Guyan Valley*, adding a pertinent comment. Said the court:

> Wherever in the hospital an emotionally vulnerable group of patients and their visitors may be present, we feel that unique considerations come into play which justify an otherwise overly broad no-solicitation rule.
>
> [I]t must be remembered that Respondent's facility is not a manufacturing plant, it is a hospital. And it is in the nature of hospitals that certain of the working areas (hallways, elevators, stairs, patient's rooms, gift shops, etc.) are necessarily open to the use of patients and visitors. . . . Further, the hospital services ill individuals who, in their weakened condition may readily be upset if they overhear antiunion-prounion arguments . . . .
>
> *Guyan Valley Hospital,* 198 NLRB 107, 111 (1972).
>
> It is surprising that the NLRB changed its own established viewpoint on this matter so utterly, and we find its now repudiated analysis more appropriate than its present position in the instant case.

Id. at p. 13.

Also indicative of the Board's lack of expertise is the finding, without supporting evidence, that ambulatory pa-

tients are somehow less susceptible to trauma than are patients confined to their rooms.

Under these circumstances, one must question whether the Board is in fact entirely free to cast aside prior rulings and to adopt new policies. While that rubric may well apply in many instances, it would seem that the Board is at least precluded from altering policies where the effect of such action cuts contrary to the intentions expressed by Congress. Rather than cursorily approving this shift in approach which can produce the sort of adverse consequences which Congress sought to avoid, one would expect reviewing courts to provide corrective direction to an agency which has strayed beyond the bounds intended by Congress. The approach of the Court of Appeals for the Sixth Circuit in *NLRB v. Summit Nursing Convalescent Home,* 472 F. 2d 1380 (6th Cir. 1973), *denying enf. to* 196 NLRB 769 (1972) is instructive. In that case the Board had overturned the decision of its Trial Examiner who had upheld a no-solicitation/no-distribution rule which applied in all patient or public areas within the home on the basis that the rule was necessary to maintain efficient operations in the nursing home.[5] The Board held that it could find no extraordinary circumstances justifying such a broad rule. The Sixth Circuit refused to enforce the Board's order and said:

> Based on all the facts and circumstances disclosed by the record in this case, the Court finds that the rule

[5] The rule stated:

> In order to give our undivided attention to the job of caring for our patients, no employee shall engage in solicitation for any cause or distribute literature of any kind during an employee's working time at any place in the home. No employee should engage in solicitation or distribution of literature at any time in the patient or public area within the home, or in the nurses' stations. No employee shall distribute literature for any cause in working areas of the home, at any time.

> published and promulgated by respondent which is set out therein is reasonable and the Board should have adopted the decision and recommended order of the Trial Examiner. *Id.* at 1380.

It is an unfortunate circumstance, calling for corrective action by this court, that the First Circuit misapplied the notion of judicial constraint in rendering its decision in this case.[6] The decision of that court to enforce the Board's order in respect to the cafeteria and coffee shop is erroneous in that the court failed to give heed to its own concerns as to the propriety of Board action in regard to applying the *St. John's* doctrine. In refusing to permit the Board to expand the scope of its order beyond the cafeteria, the Court of Appeals said:

> We are also constrained to give a narrow reading to the Board's decision and order in view of the fact that the Board has only recently been given jurisdiction over non-profit hospitals. The law affecting solicitation and distribution in these hospitals is still largely undeveloped and we think that it would be particularly inappropriate for the Board to be adjudicating patients', hospitals' and employees' rights in as cursory a fashion as would be indicated by giving a broad reading to footnote 2 in this case.

554 F. 2d at 482.

Thus, it is the responsibility of this Court to direct the Board toward implementation of a policy which gives

[6] The District of Columbia Circuit in *Baylor University Medical Center, supra,* stated:

> Petitioner *aptly* suggests that the First Circuit in relying on the NLRB ruling in *St. John's Hospital* could not have realized how scant the evidence on which that decision was based had been.

Id. at p. 20, n.62 (emphasis supplied).

some measure of attention to the rights of patients to beneficial health care. Integral to that policy must be recognition of the fact that it is the Hospital which possesses the medical expertise required to determine what rules are necessary to preserve the medical well-being of persons under its care. Such a re-direction of the Board toward a policy which better manifests Congressional intent is well within the power of this Court and is called for under the circumstances of the case at bar.

B. *The Board Did Not Meet Its Burden of Proof Because of Its Failure to Articulate Persuasive Reasons for Its Decision, Which Was Not Supported by Substantial Evidence.*

It is clear that even under the standards developed in the ordinary industrial setting for assessment of the validity of no-solicitation and no-distribution rules the First Circuit erred by failing to require the Board to satisfy the burden placed upon it.[7] Section 7 of the Act, 29 U.S.C. § 157, grants employees a twofold statutory right, the right to engage in or to refrain from self-organization. This two-edged guarantee is protected by sections 8(a)(1) and 8(b)(1) of the Act. 29 U.S.C. §§ 158(a)(1) and 158(b)(1). In addition to employee rights, the Act recognizes the right of an employer to control the use of its property to maintain order and discipline in its business establishment. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). The Board and the courts attempt to maintain an accommodation between employee-employer rights with as little "destruction of one as is consistent with the maintenance of the other." *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956).

[7] See n.6, *supra*.

The Board has developed rules as basic postulates to be applied in testing the propriety of no-solicitation, no-distribution rules. Employees may be prohibited from soliciting during working time and from distributing literature in working areas during working and non-working time. *Seng Co.*, 210 NLRB 936, 86 LRRM 1372 (1974). A rule forbidding distribution by employees in non-working areas during non-working time is presumptively invalid, and a rule prohibiting union solicitation by employees during non-working hours is presumptively invalid, even if limited to working areas. *Stoddard-Quirk Manufacturing Co.*, 138 NLRB 615, 51 LRRM 1110 (1962). A presumptively invalid rule may become proper if the employer can demonstrate "special circumstances" to justify its promulgation and enforcement.

However, in the present case, since a hospital is involved, it was not necessary for the employer to demonstrate the existence of "special circumstances" to justify its rule. As the Board itself has recognized in its *St. John's* decision, 222 NLRB 1150, 91 LRRM 1333 (1976), the unique nature of a hospital setting is in and of itself a special circumstance justifying a restriction on solicitation and distribution activity. Thus, given the existence of special circumstances, there is no presumption of invalidity of the rule for Beth Israel Hospital to overcome. The burden is on the Board to justify its decision holding that the Hospital violated the Act by enforcing that rule. This the Board failed to do and in enforcing the Board's order despite that failure, the Court of Appeals erred. The proper course for the Court would have been to compel the Board to articulate logical reasons to justify its illogical view that the unique setting of a hospital, *i.e.* its own conceded special circumstance, somehow ceases to operate as such in areas where patients and visitors have access.

As the Tenth Circuit correctly viewed the burden to be met by the Board:

> Once it is admitted that union solicitation is disruptive of the tranquil atmosphere essential to the Hospital's primary function of providing quality patient care and may be unsettling to patients who are seriously ill and thus in need of quiet and peace of mind, it is unreasonable to conclude that these adverse effects of union solicitation will occur in some patient access areas but not in others. As demonstrated above such a distinction is totally unsupported by the record evidence and involves medical and administrative judgments outside the Board's acknowledged area of expertise.

St. John's Hospital and School of Nursing, Inc. v. NLRB, 557 F. 2d 1368, 1374 (10th Cir. 1977).

As the Circuit Court of the District of Columbia stated in *Baylor University Medical Center v. NLRB, supra*:

> [C]ertainly the imposition of any additional sources of potential disruption should only be required reluctantly and after a far more detailed analysis than the NLRB devoted to this particular case.

Id. at pp. 9 and 10.

The Board has shown no valid reason for distinguishing between patients and their visitors. The upset and discomfort in regard to health care of one may be expected to be communicated to the other. Even more crucial, however, is the Board's failure to demonstrate that the considerations regarding health care and patient disruption which make a hospital setting a special circumstance in itself are not present in patient access areas such as the cafeteria. To sustain its burden and to validate its decision, the Board must demonstrate by substantial evidence that it would be improper for the Hospital to enforce its rule in the cafeteria. *Universal Camera Corp. v. NLRB,* 340 U.S. 474 (1951). Rather than provide such proof, the Board has offered a non-medical theory, adopted by the First Circuit, apparently based on a conjectural distinction between ambulatory and non-ambulatory hospital patients. The key tenet of the Board's doctrine is that the place in which a patient is subject to disquieting elements is, somehow, significant. There is, however, no record evidence to support a distinction that those patients in the cafeteria are somehow less susceptible to trauma than are these same patients while in their rooms or in other areas of the Hospital. Instead, pure common sense indicates that any disruption in a hospital setting can be traumatic to a patient's health, whether the disruption comes from the activities of employees situated within a patient's room or while he is visiting with his children in the hospital cafeteria. It really makes little difference where the disruption occurs, since it is the nature of the activity which creates patient anxiety, unrest or emotional distress.[8]

This flaw in the Board's reasoning has been noted by the courts of other Circuits.

In *St. John's Hospital and School of Nursing, Inc. v. NLRB, supra,* the Tenth Circuit said:

[8] This insistence by the Board that rules governing solicitation and distribution in a hospital be drafted according to illogical lines of demarcation accounts for the fact that litigation involving Beth Israel Hospital's no-solicitation/no-distribution rule is in its present undesirable procedural posture. The validity of the rule as applied in patient care areas other than the cafeteria and coffee shop is now being litigated in administrative channels. There is, in fact, no sound reason for the Board's decision so to structure this litigation, for there exists no significant factors to distinguish the cafeteria from other patient access areas.

> We are convinced, however, that Congress was deeply concerned with the "need to avoid the disruption of patient care *wherever possible*" and that this concern was not limited to those areas in which specific statutory exceptions were enacted. Accordingly, we conclude that the needs of hospital patients are to be afforded considerable weight in striking the appropriate balance between the undisputed rights of hospital employees to engage in self-organizational activities and the equally undisputed right of the Hospital to maintain services, order, and discipline in its operations.

557 F. 2d at 1374 (emphasis in the original).

The Seventh Circuit has taken a similar position on this issue. In enforcing an order of the Board upon a factual record differing from that developed in the case at hand, the court explained:

> Petitioner also challenges the Board's decision in this case on the basis of the primary ground relied upon by the Tenth Circuit for denying enforcement in *St. John's*: that the Board's conclusion, that the interests of patients well enough to frequent areas such as cafeterias and lounges is outweighed by the interests of employees in those areas, is erroneous because it is based on the faulty assumption that ambulatory patients are better able to endure any unsettling effects of solicitation and distribution than patients who are confined to their rooms. We agree with petitioner and the Tenth Circuit that this distinction is unsound. In many cases ambulatory patients are far sicker than confined patients. For example, it is implausible to suppose that a person with leukemia who is able to walk to the cafeteria is better able to accept stress than a person confined to his bed with a fractured leg. Thus, if the Board's decision rested on this reasoning alone, it could not be upheld.

Lutheran Hospital of Milwaukee, Inc. v. NLRB, 564 F. 2d 208, 215 (7th Cir. 1977). And, in an Administrative Law Judge's decision in a case related to the case at hand, *Beth Israel Hospital* (Decision of Administrative Law Judge dated December 14, 1977),[9] it was stated that:

> The fact that a patient is ambulatory, i.e., able to walk about on his own, furnishes no indicium as to the seriousness of his illness. Ambulatory patients may be quite sick. All patients who do not die are ambulatory at some stage of their stay in Beth Israel.

Decision of December 14, 1977 at p. 3; p. 49, *infra*.

In light of the fact that psychiatric outpatients frequent the cafeteria, dressed in street clothes, the Board's distinction between ambulatory and non-ambulatory patients as a basis for the "immediate patient care area" formula may be said to serve as an indication that the Board lacks expertise in regard to the operation of health care institutions. The fact that the Board provided no medical evidence to support that distinction illustrates the failure of the Board to carry its burden of proof.

C. ***Even Assuming that Petitioner Bears the Burden of Proof, Petitioner has Met Its Burden by Evidence of the Existence of Special Circumstances in the Cafeteria and Coffee Shop.***

The Court of Appeals not only erred in failing to hold the Board to its burden of proof, it compounded its error

[9] This case is unreported and pending on exceptions before the National Labor Relations Board. The decision is set forth in the addendum of this brief.

by failing to credit Petitioner with having met the burden it was improperly forced to shoulder. The Hospital made all of the proof it was required to make, indeed all that it could possibly make, by showing a concurrence of three factors: (1) patient and visitor use of the cafeteria; (2) union activity in that area including the distribution of material which disparaged the quality of health care at the hospital and (3) established Board precedent that such solicitation and distribution of literature is potentially disruptive.[10] Under established Board precedent, even in a non-hospital setting that potential for disruption is a sufficient basis for a finding that a ban on such activity is justified; therefore Petitioner showed that its obligation to provide patient care in accordance with the dictates of sound medical practice constitutes a special circumstance which validates its rule regarding solicitation and distribution. This obligation entails a technical curing function and a human caring function twenty-four hours a day. The duty of patient care does not terminate once the patient enters the cafeteria or coffee shop. Rather, it is an around the clock operation. The primary concern of the Hospital is the care of its patients and under no circumstances may patient care be compromised. The no-solicitation and no-distribution rules are directed to that end.

It cannot be denied that union solicitation in the cafeteria creates the possibility of upset of patients and visitors in that area. This possibility clearly justifies the Hospital's ban on such activity. There is ample evidence in the record that the cafeteria was used by large numbers of patients (J. Ex. No. 25). These patrons include

[10] "[S]olicitation, if carried on . . . where customers are normally present, might conceivably be disruptive of the respondent's business." *Marshall Field & Co.*, 98 NLRB 88 (1952), *enf.*, 200 F. 2d 375 (7th Cir. 1952), *et. seq.*, cited *infra* at p. 30.

outpatients (Tr. 90), psychiatric inpatients and outpatients (Tr. 91, 104), and several who frequent the cafeteria dressed in bedclothes, with intravenous tubes attached (Tr. 75).[11]

The patients who use the cafeteria do so for many reasons. In the case related to the instant litigation noted above, wherein the validity of the same rule as enforced by the same employer was involved, the Administrative Law Judge found that (patients) utilize the services of the cafeteria not only as a place to get something to eat but as a place where they can see their children who are forbidden by hospital rules to visit them in their rooms.

Beth Israel Hospital, Decision of Administrative Law Judge dated December 14, 1977 at p. 2; p. 48; *infra. See also* J. Ex. No. 24 at p. 8 (A. 121).

That it is necessary to insulate patients from possible sources of disruption, wherever such possibility exists, is a basic precept of the medical philosophy of the Hospital. This policy is merely one facet of Beth Israel's overall concentration on providing total care for the patient.

This Hospital is recognized as being in the forefront of the nation's health care institutions in preserving patient rights (R. Ex. No. 2, A. 135). Every new employee at Beth Israel Hospital is given a copy of the pamphlet, "Your Rights as a Patient at Beth Israel Hospital" (R. Ex. No. 1; A. 41). Additionally employees are made aware of such a publication in employee meetings and in the employee newsletter. The widespread dissemination of the "Patients' Rights" pamphlet and the explanation of the contents therein to employees demonstrates that patients too have rights which must be taken into account (A. 44-45). Patients are given

[11] The concurrent use of the cafeteria and coffee shop by large numbers of patients, visitors, and employees is also indicated by the information booklets distributed to patients (J. Ex. No. 24, p. 12, A. 120) and to employees (J. Ex. No. 1, p. 22, A. 55).

a patient information booklet (J. Ex. No. 24, A. 120; Tr. 17) and the patients' rights booklet. Two particular rights are considered vital: the patient's rights to privacy (R. Ex. No. 4, A. 139; A. 41) and to total quality medical care. In this atmosphere, then, it can hardly be considered unwarranted for the Hospital to seek to protect its patients from unsubstantiated charges disparaging the quality of health care, such as were contained in the union pamphlet "As We See It" (J. Ex. Nos. 18A, *et seq.*, A. 76). The speculative conclusion that ambulatory patients, well enough to frequent public areas of the hospital, are highly unlikely to be harmed if they happened to read the union literature is another example of the Board rendering medical judgments without the benefit of medical expertise or of medical evidence in the record. In fact, visitors and patients exposed to union literature attacking the quality of patient care provided by the hospital and applauding work stoppages may well become anxious and apprehensive. *Beth Israel Hospital,* Decision of Administrative Law Judge dated December 14, 1977. Addendum.

Contrary to the view of the Board, any fair reading of that material compels the conclusion that patient trauma would be highly *likely* to occur upon reading that the administrators of the Hospital ". . . don't give a damn about the patient care and shouldn't be working in a hospital in the first place . . ." (J. Ex. No. 18L, A. 99). It is appropriate to contend that a patient's mental and emotional well-being might receive a jolt upon being informed that alleged understaffing has led to the complaint of a purportedly overworked nurse who asks:

> How often are you knowledgeable of the medical status of your patients? When a relative or friend of a patient asks you "How is she/he feeling?", can you really answer the question? (Often I'll know if the patient has voided or eaten well, but she/he may have impending congestive heart failure for all I know.) There are times when I can skim through the patients' charts, but that opportunity should occur with every patient who is under my care. Even though I've become somewhat adjusted to it, I still resent knowing usually only the medical diagnosis stated in the Kardex.

(J. Ex. No. 18M, A. 107). And must the Hospital accept the consequences of complying with an order based on the "medical" judgment of the Board and the First Circuit that a maternity patient at Beth Israel would be highly unlikely to be harmed by reading the account of a "Successful Birth In Spite of BI" printed in "As We See It"? That article contained such assertions as the following:

> At 8:15, the doctor came in, but I couldn't turn over because I was in too much pain, so she left without examing [sic] me. I wanted to vomit. My stomach was hurting, my back was hurting, but she said, "Well, she's all right," and she left. She went home, and it seems that she didn't tell the next doctor on duty what was happening to me.
>
> A nurse came in and asked me where it hurt. Where else would it hurt but my stomach? I was in too much pain to answer her, so she left.
> A few minutes later, my water broke. I didn't know what it was because it was my first kid, and then my baby tried to come out all by himself. I screamed, and another nurse came in and rushed me to delivery. Then a doctor who didn't know what was going on with me came in and finished the delivery. I heard him say, "But I don't know anything about the patient."
>
> . . .

> They tried to cheat me out of my maternity leave, overcharged me, and totally ignored me while I was a patient. My experience was bewildering, painful, and ugly. I was lucky it wasn't a complicated delivery. Don't ever have a baby here unless you have a private doctor.
>
> A BI Employee

(J. Ex. No. 18D at pp. 5-6, A. 76).

Actual patients of Beth Israel have expressed the feeling that it is upsetting to overhear discussions of patient care matters by doctors (R. Ex. No. 3(b) at p. 2, A. 137). To hold that these patients would not be likely to be upset by exposure to the types of allegations regarding patient care as were contained in "As We See It" is contrary to the evidence and to simple logic.

It cannot be denied that union solicitation in the cafeteria might prove upsetting to patients in that area. Employee Schunior, who was warned for violating this rule (J. Ex. No. 17, A. 75), claimed to be able to differentiate between employees and patients. Yet, even she admitted that she was not aware that psychiatric outpatients used the cafeteria until after she was ordered to cease her activity (A. 42). It is precisely this type of patient that the Hospital must take steps to protect from disturbing elements. Moreover, several of the indicia upon which Schunior claimed to rely in distinguishing between employees and patients, while soliciting, *e.g.*, clothing and identification bracelets, were shown to be not present in many instances (A. 51, 52). In any event, the Hospital cannot expect that all employee-solicitors would possess Schunior's uncanny ability to differentiate among cafeteria users. More importantly, Petitioner cannot be expected to assume the same risk of harm to patients should Schunior make a mistake in identification that Schunior herself is willing to assume.

It is Petitioner, not Schunior, or the union or the Board, which is charged with ultimate responsibility for the well-being of its patients. To compel Petitioner to risk traumatization of its patients who venture into the cafeteria is to impair its ability to provide patient care in accordance with sound medical practice.

It is not a matter of speculation that union solicitation can be upsetting to patients. In fact:

> Adult human beings become childlike, vulnerable, and irrational when they are sick. From a patient's point of view, the ideal hospital environment is one of quiet professionalism, efficiently organized, which is directed to his needs. Solicitation and distribution in 15 patient access areas[12] can interfere with patient care functions. Such activity can be disturbing to patients and their families, persons who are particularly susceptible to being disturbed. Such disturbance can interfere with Beth Israel's primary function of curing illness.

Beth Israel Hospital, supra, Decision of Administrative Law Judge dated December 14, 1977 at p. 3.

A similar finding was made by the Court of Appeals for the District of Columbia Circuit in its recent, unpublished opinion in *Baylor University Medical Center* v. *N.L.R.B.*, No. 76-1940 (D.C. Cir. February 14, 1978). The court said:

> It is not only the likelihood that congestion and commotion would result from such solicitation, but also the inherently disturbing effect of interjecting undertones of labor disputes into a situation where sick persons are totally dependent on the unflagging assistance

[12] The number "15" appearing in this line is apparently a typographical error. A motion has been made to correct that error, and that motion is pending before the Board. *See* addendum.

> of others that are major factors contributing to the disruptive effect of solicitation. Wherever in the hospital an emotionally vulnerable group of patients and their visitors may be present, we feel that unique considerations come into play which justify an otherwise overly broad no-solicitation rule.

Id. at p. 13.

Thus, it must be concluded that union activity in patient access areas such as a cafeteria presents a risk of interference with the care of patients. Yet, the decision of the Court of Appeals, enforcing the Board's order, would require the Hospital to demonstrate actual harm, *i.e.*, a setback in the recovery of a patient, before it could justify a ban on disturbing activity. 554 F. 2d at 481. Such an approach features the wholly unacceptable element of experimentation with the health of innocent third parties. Moreover, this decision represents a severe departure from the Board's attitude toward other types of employers whose labor relations must be conducted in accommodation with third parties. The decision in the case at bar illustrates the disturbing fact that, rather than give special attention to the rights of hospital patients, the Board has refused to accord them even the same rights as have been given to customers in a department store or to patrons in a restaurant.

In department stores and similar retail businesses it has been held that solicitation in the store's public areas, such as selling floors, elevators, corridors, and public restaurants, where employees and customers interact, may be forbidden at all times. *Marshall Field & Co.*, 98 NLRB 88 (1952), *enf.*, 200 F. 2d 375 (7th Cir. 1952). The reason for the exception to the general rule is that solicitation where customers are normally present *might conceivably* be disruptive of the respondent's business. *May Department*

Stores Co., 59 NLRB 976 (1944), *enf. as mod.*, 154 F. 2d 533 (8th Cir. 1946), *cert. denied*, 329 U.S. 725 (1946).

In a restaurant setting the Board has held that a no-solicitation rule enforced by an employer on a public restaurant's premises did not violate the Act since "[u]nder [the] circumstances union solicitation in the restaurants *is as apt* to disrupt the [employer's] business as is such solicitation carried on in any other [part] of the store in which customers are present" (emphasis supplied). *Goldblatt Bros., Inc.*, 77 NLRB 1262, 1264, 22 LRRM 1153 (1948). A ban on solicitation limited to *public* areas of a restaurant, such as customer or sales areas, during working or non-working time is valid (emphasis supplied). *See Marriott Corp. (Children's Inn)*, 223 NLRB 978, 92 LRRM 1028 (1976).

Another decision of the Board involving a restaurant situation, *Bankers Club, Inc.*, 218 NLRB 22, 89 LRRM 1812 (1975), amply illustrates the approach adopted by the Board when the third parties involved are diners. In an opinion approved by the Board, the Administrative Law Judge stated:

> The Board has long approved employer rules prohibiting all solicitation, even during employees' nonworking time, in the selling areas of stores and other establishments, such as restaurants, on the theory that such activity might *tend* to drive away customers.
>
> . . .
>
> In the case of restaurants or other establishments where customers are present it is their presence and the *likelihood* of their being exposed to union activities that creates the "special circumstances" that justify infringing on employees' basic rights.

218 NLRB at 27 (emphasis supplied). In regard to distribution, the same considerations held sway:

> [L]iterature in the customer area not only might create a litter problem, but might also antagonize customers who find and read a discarded copy. Whatever short- or long-run ill effects on customer appetite or patronage might flow from a flyer advocating a boycott of lettuce or grapes, not to mention one attacking Respondent's labor policies — with or without recommendations — I cannot say but *Respondent should not have to bear the risk* of any when there are other areas for distribution in the restaurant. I find that the no-distribution portion of the rule is not overly broad and illegal.

Id. (emphasis supplied).

Almost unbelievably, the Board has rationalized the less stringent burden of justification placed upon restaurant operators than is imposed upon a hospital on the ground that union activity could tend to upset the digestion of restaurant patrons. In *McDonald's Corp.*, 205 NLRB 404, 84 LRRM 1316 (1973), it was found that:

> [t]here is no probative or substantial evidence that union or other solicitation would not be obvious to Employer's customers. Some solicitation might result in a pleasant and informative chat between the employees on their nonwork time in working areas. On the other hand, it might lead to a bitter exchange of insults or worse, the latter *not being likely to be conducive to good digestion* by Employer's hopefully otherwise happy customers."

205 NLRB at 407, p. 18 (emphasis supplied). Nevertheless, no such concern is exhibited by the Board for patient-patrons of a hospital cafeteria who undoubtably suffer from much more severe disorders than mere indigestion. As the

Tenth Circuit observed in *St. John's Hospital and School of Nursing v. NLRB, supra*:

> The question thus presented, to strike an acceptable balance between employee solicitation under the Act projected against the concept of hospital patient care, is indeed difficult. A cautious judgment in such regard must note that error in such judgment may cause irreparable damage to patients, and thus to the public, while error in the other direction can be salvaged by the Board under proper use of its overall expertise in labor matters.

557 F. 2d at 1371.

The Board's position, however, as illustrated by the decision in the present case, is that employers in the business of caring for sick persons are to be held to a stricter standard than are employers selling clothing or hamburgers. This decision, enforced by the First Circuit, flies in the face of good common sense.

In any event, it is clear that a policy which permits no-solicitation rules where the activity might upset retail customers or restaurant patrons but which prohibits such rules unless a harmful effect upon sick persons is actually shown hardly reflects a recognition by the Board of the concerns expressed by Congress in permitting the Board to assume jurisdiction over hospital employees.

More restrictive no-solicitation, no-distribution rules are necessary in a hospital cafeteria and coffee shop in order to avoid the disturbance of the hospital's relationship with its patients in the course of providing health care. The Hospital contends that the retail store analogy is applicable because solicitation and distribution of literature in the cafeteria and coffee shop might undermine the tranquil atmosphere required in a hospital setting. Certainly,

if a customer in a store who is intent on buying merchandise is shielded from disruption, there are more compelling reasons why hospital patients and their visitors should be similarly protected. Customers in a retail store or restaurant who are distracted by solicitation or distribution activities are free to leave the premises never to return again. The customer need only endure a few moments of discomfort. In contrast, the patient in a health care facility usually remains for at least several days of treatment. Solicitation and distribution activities could thereby upset patients and their visitors for extended periods of time. Furthermore, unsubstantiated or unwarranted statements conveyed in this manner could readily abuse, if not destroy, the trust which patients and visitors place in the Hospital. Once a patient has been admitted to a hospital or nursing home, it is unlikely, given his state of health, that he would leave the facility and seek health care elsewhere.

In enforcing the Board's order, the First Circuit expressed the following view:

> This is not to say that the Board does not bear a heavy continuing responsibility to review its policies concerning organizational activities in various parts of hospitals. Hospitals carry on a public function of the utmost seriousness and importance. They give rise to unique considerations that do not apply in the industrial settings with which the Board is more familiar. The Board should stand ready to revise its rulings if future experience demonstrates that the well-being of patients is in fact jeopardized.

554 F. 2d at 481. This method of proceeding may eventually result in the Board's promulgating the rule which will properly reflect its duty under the Act, but only at the incalculable cost of actual harm to suffering patients.

It is the duty of this Court to prevent such experimentation with the health and well-being of innocent third parties.

D. *Petitioner's No-Solicitation, No-Distribution Rule was Not Discriminatorily Applied.*

It is, of course, inappropriate for the Board to attempt to equate this type of potentially upsetting matter with the innocuous type of solicitation (blood drives, car pool lists, baby gifts, etc.) permitted in the cafeteria. It is the controversial, as opposed to noncontroversial, nature of the conversational or printed matter that is significant in considering the interest of hospital patients. It was this medical decision, falling outside the scope of Board expertise, that motivated the Hospital to decide to protect its patients from the potentially harmful effects of such controversial matters. Beth Israel Hospital has exhibited no desire to stifle its employees or to hinder their organizational efforts. It merely claims a right to decide that it is not in the interests of patients' medical well-being for those patients to be subjected to attacks against the quality of care they are receiving such as those put forth in the union literature.

This point was emphatically made by the court in *Baylor University Medical Center v. N.L.R.B.*, No. 76-1940 (D.C. Cir. February 14, 1978) which said that:

> Respondent points out that Baylor does allow solicitation for the United Fund and the American Cancer Society, as well as holding an occasional bake sale and benefit fair (a program designed to acquaint the employees with the benefits available to them). Respondent's Brief at 20-21; J.A. 173-181. The fact that Baylor permits such activities while banning other forms of solicitation does not, however, indicate illicit discrimination on the part of petitioner, as the

> solicitations which are permitted are manifestly non-disruptive and carefully controlled (the Cancer Society solicitation, for example, consisted only of a note included in each employee's paycheck) J.A. at 174, Testimony of Mr. Howard Chase. *These solicitations are part of a normal hospital operation and all lack the emotionally disturbing aspect of union solicitation* in that they could not conceivably raise fears in patients or visitors that they might not receive the best possible health care.

Id. at p. 10, n.29 (emphasis supplied).

Moreover, the Board's argument raising the issue of disparate treatment must be evaluated with recognition of the fact that many of the items mentioned as being publicized in the cafeteria, *e.g.* National Nutrition Week, a cost reduction drive and car pooling, must be categorized as being work related. The Board has held that communications regarding work related matters are proper, even in areas where solicitation and distribution are prohibited. *Rochester General Hospital*, 234 NLRB No. 44 (1978). In that case such activities included Red Cross postings, blood collections, and displays of pharmaceutical products and medical books. In addition, the Board has recognized that an employer may allow solicitation for particular charities while banning other types of solicitation. *Astronautic Corporation of America*, 164 NLRB 623, 65 LRRM 1161 (1967); *May Department Stores Co.*, 174 NLRB 770, 70 LRRM 1307 (1969).

E. *Ample Alternative Means of Communication Are Available to Employee Organizers.*

Petitioner submits that the availability of alternative areas of communication is not a relevant inquiry here.

First, in the directly analogous restaurant-retail store setting, the Board does not inquire into the availability of such alternative means of communication. Secondly, this case involves *employee* organizers. Employees are not to be judged by the same standards as non-employees. *NLRB v. Babcock and Wilcox Co.*, 351 U.S. 105 (1956). Petitioner contends that it need not bear the burden of proving that alternative channels of communication exist in order to sustain the validity of its no-solicitation, no-distribution rule.

Even if this were a relevant inquiry, and assuming *arguendo* that the Hospital must provide alternative access to its employees, it has been shown that employee organizers do have adequate opportunity to communicate both on and off hospital premises (A. 30-34; J. Ex. No. 31, A. 127).

Of course, any employer is entitled, under established Board doctrine, to communicate with its employees through external avenues such as pay envelope messages (A. 21) and newsletters (A. 42-43). The employer need not, however, make such channels of communication open to union organizers. *See NLRB v. Clark Phonograph Co.*, 176 F. 2d 341 (3d Cir. 1949). Nor must an employer use those avenues which are available to the union to establish their efficacy. *See Bonwit Teller, Inc. v. NLRB*, 197 F. 2d 640, 646 (2d Cir. 1952). The significance of this factor was not given sufficient credit by the Court of Appeals. *NLRB v. United Steelworkers of America, CIO*, 357 U.S. 357, 364 (1958). The proper approach is that adopted by the Tenth Circuit in *St. John's Hospital and School of Nursing v. NLRB*, 557 F. 2d 1368 (10th Cir. 1977), wherein it was explained:

> In the present case it is stipulated that 80% or more of the employees use the employee-only lunch-

room and cafeteria on a daily basis. It is further stipulated that there are numerous other employee-only areas such as lounges, locker rooms, restrooms, and parking areas in which unrestricted access to employees is permitted. Although not controlling, when this factor is considered in conjunction with the expressed congressional concern for protecting "patient care" wherever possible, the conceded fact that solicitation may be unsettling to patients, and the absence of any record evidence to support a distinction between the sensibilities of bedridden vis-a-vis ambulatory patients we are compelled to conclude that the balance struck by the Board is unsupported and unreasonable. In contrast the Hospital's restriction on solicitation in all patient access areas comports with the realities of modern hospital care, where the emphasis is on having the patient ambulatory as soon as possible and strikes a reasonable, easily applicable balance between the interests of the Hospital in maintaining the tranquil atmosphere essential to quality patient care and the self-organizational interests of the employees. We therefore deny enforcement of the Board's order insofar as it would permit solicitation in patient access areas.

Id. at 1375.

It is especially significant to note that in *Baylor University Medical Center v. N.L.R.B.*, No. 76-1940 (D.C. Cir. February 14, 1978), it was found that there were sufficient alternative areas provided for union solicitation so as to justify the ban on such activity in the cafeteria and corridors, even though that hospital provided much less indoor space for solicitation than does Beth Israel Hospital. *See* n.4 at p. 3.

F. *The Rule Is Not Reflective of Any Anti-Union Bias on the Part of Petitioner.*

That the no-solicitation rule is in no way indicative of any anti-union animus on the part of the Hospital is made abundantly clear by the fact that similar restrictions have long been placed upon the members of Beth Israel's professional staff. The message has repeatedly been conveyed to *all* who work at Beth Israel that patients are to be shielded from upsetting influences at all times and in all areas of the hospital. For example, in July of 1971 the medical staff was admonished that:

> Less attention is paid to form and content of other words we scatter about the Hospital. Unlike our output for the medical record, these words are often ingenuous yet more public and readily overheard, inevitably subject to misrepresentation. I refer to the casual conversation in the corridor or elevator, in the lobby or *cafeteria* line. More than once a visitor has been privy involuntarily to a conversation or fragment of commentary he is apt to appropriate as having relevance to the patient he is visiting. The effect can be devastating. Even our conventional jargon can be desperately unsettling when overheard, or involuntarily deprive a patient of a measure of privacy he should enjoy.

(R. Ex. No. 3(a), A. 136, emphasis supplied.)

Doctors were again advised, in July of 1973, that:

> Among the rights of patients we insist upon is the right to privacy. This includes not only the reassurance of privacy in the process of history-taking and physical examination and restriction of access to the

> information obtained thereby, but equivalent discretion to be exercised in the discussion of such privileged information among physician colleagues. Patients and visitors are often horrified to overhear — in elevators, *cafeteria lines,* nursing unit corridors and stairwells — what is to the engrossed clinician innocuous professional discussion. And when patients' names are mentioned or gratuitous commentaries added, the error is compounded manyfold. Please restrict the voicing of your clinical discussion to include none other than your intended audience.

(R. Ex. No. 3(c), A. 138, emphasis supplied.)

This evidence, coupled with the fact that employees are freely permitted to exercise their organizational rights in various areas of the hospital, serves to verify that the no-solicitation rule applied in patient access areas such as the cafeteria is merely one part of Beth Israel's overall policy concerning the necessity of freedom from upset as an element of total patient care. And it should be noted that the Hospital has acted consistently in this regard. (Compare existing rule in fn. 1 herein with prior rule, J. Ex. No. 5, A. 63.) Although a modification of the rule was effectuated as a result of litigation before the Massachusetts Labor Relations Commission, it remained the view of Beth Israel, based on its medical expertise, that solicitation activity is disruptive of patient care. Thus, when the Union sought to take advantage of newly created federal jurisdiction to expand upon the state Commission's order (J. Ex. No. 15, A. 71), Beth Israel Hospital reverted to its ban on all solicitation and distribution of literature in the cafeteria and other public areas. The Hospital had thus hoped to satisfy the dual goals of protecting its patients from upsetting influences while securing review by the Board and the courts, including this Court, of the broad

question of the validity of a total ban on solicitation and distribution in areas of a hospital to which patients and visitors have access.

This consistent concern for the well-being of its patients is also shown by the fact that Beth Israel Hospital has attempted to shield its patients from all disruptive influences, not particularly those arising from heated conversational exchanges concerning union activity. The rule was, in fact, originally formulated to shelter patient and visitor access areas of the Hospital from disconcerting debates concerning the Viet Nam War. That the rule was continued in effect and applied to ban activity which the Board has itself admitted can be upsetting to patients certainly cannot be said to indicate any anti-union bias on the part of Petitioner.

II. Even without Considering the Special Circumstances that Exist as a Result of a Hospital's Function in Providing Patient Care, No Rational Basis Exists for the Board's Disparate Treatment of a Hospital Cafeteria and a Non-Hospital Restaurant.

A. *Commercial Considerations Were Improperly Overlooked.*

The patient and public areas of the Hospital are all utilized as a part of the service that the Hospital provides for its customers-patients and their visitors. Like the selling or public areas of a retail store, the patient and public areas of the Hospital should not be converted into an arena for the organization of employees, *supra.*

This Court might inquire, with more freedom than the Court of Appeals chose to exercise, *see* 554 F. 2d at 480, n.2, as to the reasoning of the Board in deciding that a commercial food-retailing establishment is to be treated differently merely because it is located within a health care complex. It is an inescapable fact that, apart from all the crucial

considerations regarding health care, the Beth Israel Hospital cafeteria and coffee shop are commercial restaurant facilities. There is no rational basis for treating a restaurant employer differently because his commercial establishment is located within a hospital and serves hospital employees. The Board erred in affording disparate treatment to hospital cafeteria operators, and it was error for the First Circuit to defer to the Board's treatment of this issue. The Tenth Circuit in deciding *St. John's Hospital & School of Nursing v. NLRB,* 557 F. 2d 1368 (10th Cir. 1977), noted that the First Circuit in the instant case

> failed to consider the hospital's normal "commercial" interests in the operation of a public cafeteria and coffee shop and the fact restrictions on solicitation are universally allowed in analagous facilities in non-hospital settings.

Id. at 1375, n.7.

It is very significant that this factor was the basis for the decision of the District of Columbia Circuit in sustaining the hospital's no-solicitation rule as it was applied in the cafeteria and vending machine area in *Baylor University Medical Center* v. *NLRB, supra.* Relying on the commercial nature of this aspect of the hospital's operation as a self-sustaining basis for justifying enforcement of the rule, the court rejected the arguments posed by the Board and said:

> Respondents suggest that the precedents involving commercial establishments are inapposite here because — unlike such institutions — hospitals do not risk losing their "customers" due to the irritation of solicitation. While the principal business of retail establishments is attracting customers, a hospital's main concern — it

> is argued — is patient care, and its shops and cafeterias are no more than peripheral to its main operation. To the extent that this argument has any force whatsoever, it is wholly misplaced in this context. Whether or not patients and their visitors have choice about whether or not to use the hospital, they certainly have a choice about whether or not to use its cafeteria and vending machines. The cafeteria and vending area must still compete to attract the business of the hospital's patients. That a hospital is not "principally" in the restaurant business does not mean that it is not concerned that the restaurants which it does operate should be as attractive and profitable as possible. Public cafeterias in hospitals are operated as a convenience to its patients and their visitors and there is no justification for saddling them with restrictions, not applicable to cafeterias generally, that might from time to time compel them to operate at a loss. Assuming arguendo that a disturbance in the cafeteria would not significantly impede the hospital's health care, Baylor still has an independently valid interest in the profitable and orderly operation of its commercial food services which justifies barring solicitation in its restaurants.

Id. at p. 16-17 (footnote omitted).

The primary function of a medical care facility is, naturally, to provide care for its patients. However, the Hospital also has an interest in the proper functioning of its commercial facilities. It is improper for the Board to assess the validity of the rule solely in regard to the Hospital's primary function of providing immediate patient care. Thus, Petitioner contends that the commercial nature of its cafeteria and coffee shop constitutes an independent basis for sustaining its rule against solicitation in those areas.

B. *Even without an Expectation of Profit, Petitioner Has an Independently Valid Interest in Making Its Cafeteria as Pleasant as Possible to Enrich the Overall Quality of the Hospital Environment for Its Customers.*

The patient and public areas of the Hospital are all areas used as a part of the service that the Hospital provides for its customers, patients and their visitors. Irrespective of whether or not Petitioner's cafeteria operation generates a profit, it is still imperative that a tranquil atmosphere conducive to relaxation and recuperation be maintained in that area. As was pointed out in the *Baylor University Medical Center v. NLRB* decision, *supra*:

> It does not appear from the record, but it may be the case, that Baylor operates its cafeteria and vending machines as a non-profit service, so that in this respect it differs somewhat in its objectives from those of the usual restauranteur. Nevertheless, in providing its services, it has much the same interest, albeit non-financial, that any owner does in making his facilities as pleasant as possible. Whether the motive is monetary enrichment or enriching the overall quality of the hospital environment, employers who operate establishments whose raison d'etre is their pleasantness are justified in imposing otherwise overbroad no-solicitation rules. It is not the goal of making money, but of running a facility whose primary goal is to be attractive that supports the special treatment accorded to restaurants in this regard.

Id. at 17.

It should not go unnoticed that it is the Hospital which has a duty to provide the therapeutic milieu required to effectuate recovery of its patients. It is the Hospital, not the Union or the Board, which is held answerable, morally and legally, when something goes wrong with the curative and recovery process.

Another consideration for this Court is the fact that the Beth Israel rule is easily understood and adapted to fair and uniform application. In contrast, the Board's "immediate patient care area" formula as developed in the *St. John's* case is patently ambiguous (a problem noted by the Tenth Circuit in denying enforcement), and promises to be a source of constant litigation in the future as it is applied to the varied operations of each individual hospital. The Board has wavered in delineating which areas of a hospital are off-limits to solicitation and distribution by employees.

The vacillation by the Board on this issue has left health care institutions in a state of uncertainty as to which rules need to be revised and which rules may be enforced with an expectation that their enforcement will not subject them to penalty upon another sudden shift of Board policy in the future. This Court should, therefore, take this opportunity to provide guidelines to the Board and courts which will reestablish that the hospital setting presents a situation where there exist third party rights which must be recognized and accommodated.

Conclusion.

For the reasons set forth above, it is respectfully submitted that the judgment of the court below should be reversed.

Respectfully submitted,

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Addendum.

Decision.

JD-846-77
Boston, Mass.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS
BOARD DIVISION OF JUDGES
WASHINGTON, D.C.

Cases 1—CA—11469, 1—CA—11479,
1—CA—11580, 1—CA—11581,
1—CA—11582, 1—CA—11661,
and 1—CA—12161

BETH ISRAEL HOSPITAL
and
MASSACHUSETTS HOSPITAL WORKERS UNION,
LOCAL 880, SERVICE EMPLOYEES INTER-
NATIONAL UNION, AFL—CIO

Kathleen F. McCarthy, Esq., and *Harold Kowal, Esq.*, for the General Counsel.

Robert Chandler, Esq., of the firm of *Stoneman, Chandler & Miller*, Boston, Mass., for Respondent.

DECISION

Statement of the Case

BENJAMIN K. BLACKBURN, Administrative Law Judge: On April 14, 1977, the Board issued its Decision

and Order in this proceeding.[1] On August 3, *sua sponte*, it remanded "to permit the parties to litigate the general applicability of Respondent's no-solicitation/no-distribution rule in areas of the hospital other than the cafeteria and coffee shop—*viz*, all areas to which patients, visitors, and employees have access, other than immediate patient care areas" because of the reservations expressed by the United States Court of Appeals for the First Circuit in *N.L.R.B.* v. *Beth Israel Hospital*, 554 F.2d 477, a prior proceeding involving the same parties and similar issues, "concerning Respondent's opportunity in this earlier case to litigate fully the validity of [the nosolicitation/no-distribution] rule as applied to areas of the hospital other than the cafeteria and coffee shop." The hearing was held on October 17, 1977, in Boston, Massachusetts. The General Counsel presented no evidence. Consequently, the following "findings of fact based upon the evidence received" at that time reflect the credited testimony of witnesses presented by Respondent:

Findings of Fact

Beth Israel Hospital is an eight-story complex of buildings, with a contiguous four-story parking garage which extends from the basement 5 through the third-story level of the hospital proper. The principal buildings are known as Feldberg and Rabb. (At the time of the events chronicled in the section of my original Decision entitled "Facts" the physical layout was somewhat different, for, I gather, Feldberg Building was still under construction at that time. The differences are 10 unimportant.) There are separate entrances to Feldberg and Rabb, the principal entrance being Feldberg. Both are off Brookline Avenue. There are also entrances on sides of the com-

[1] 228 NLRB No. 195.

plex other than Brookline Avenue. All the buildings are interconnected. Employees of the hospital are expected to park their cars on the two top levels of the parking garage. However, the rule is not strictly enforced. Patients and visitors frequently park their cars on the two top levels as well as the two bottom.

Beth Israel treats both in-patients and out-patients. Out-patients, generally, move about the hospital on their own between 8 a.m. and 4 p.m. In-patients, generally, are transported and escorted as they go from one area to another for treatment. They move through corridors and on elevators from their rooms to operating rooms, laboratories, and similar patient care areas. In so doing, they traverse almost, but not quite, all of the corridors and ride in all of the elevators in the hospital.

Patients are in areas near the Feldberg and Rabb entrances while waiting to be admitted to the hospital, while waiting for pharmacy service, and while waiting for clinical treatment as out-patients. The areas of the hospital which are off limits to them are some administrative offices, the dietary department, the kitchen, the laundry, the staff locker rooms and lounges, and the general stores areas. Occasionally, patients who have lost their way even blunder into them.

Patients who are waiting to undergo surgery or who are on the mend walk to and utilize the services of the gift shop. They also, on occasion, walk to the cafeteria. (There is no longer a separate coffeeshop in the hospital.) Their purpose is, generally, not to utilize the services of the cafeteria as a place to get something to eat but as a place where they can see children who are forbidden by hospital rules to visit them in their rooms.

Patients walk in corridors on the floors where their rooms are located as part of their therapy, frequently

soon after surgery. They also sit in corridors near their rooms on occasion. Solaria on floors where patient rooms are located are also utilized for walking and sitting therapy. This sort of activity does not, generally, occur before 7 a.m. or after 9 p.m. Other time factors are nonemergency admissions, 10 a.m. to 4 p.m., and visiting hours in nonemergency situations, early afternoon to 9 p.m. There are many exceptions to these as well as all other facts found to be "generally" true.

The fact that a patient is ambulatory, i.e., able to walk about on his own, furnishes no indicium as to the seriousness of his illness. Ambulatory patients may be quite sick. All patients who do not die are ambulatory at some stage of their stay in Beth Israel.

Adult human beings become childlike, vulnerable, and irrational when they are sick. From a patient's point of view, the ideal hospital environment is one of quiet professionalism, efficiently organized, which is directed to his needs. Solicitation and distribution in 15 patient access areas can interfere with patient care functions. Such activity can be disturbing to patients and their families, persons who are particularly susceptible to being disturbed. Such disturbance can interfere with Beth Israel's primary function of curing illness.

Conclusions of Law and Recommendations

In addition to "findings of fact based upon the evidence received," the Board's Order Remanding Proceeding to Regional Director for Hearing imposes on me the duty of including conclusions of law and recommendations in this Decision. In its brief Respondent urges conclusions and recommendations which would reverse the Board's original Decision and Order holding that the discharge of Gregory Spear on February 23, 1976, and the issuance

of warnings to employees on various occasions violated Section 8(a)(3) and (1) of the National Labor Relations Act, as amended, because the no-solicitation/no-distribution rule was invalid. Its argument is based, in part, on the United States Court of Appeals for the Tenth Circuit's reversal of the Board in *St. John's Hospital and School of Nursing, Inc.* v. *N.L.R.B.*, 557 F.2d 1368.[2] (The Board's decision in *St. John's* is found at 222 NLRB 1150 (1976).) In this proceeding, the Board relied on its *St. John's* decision to rule that Respondent's no-solicitation/no-distribution rule is an overly broad restriction on employee rights. The Tenth Circuit notwithstanding, the Board's original decision in this proceeding and *N.L.R.B.* v. *Beth Israel Hospital, supra,* make the illegality of Respondent's rule the law of the case. I am bound by that law. Therefore, I reiterate the conclusions of law contained in my original Decision and recommend that the Board reaffirm the Order it issued in this proceeding on April 14, 1977.[3]

Dated, Washington, D.C. December 14, 1977

Benjamin K. Blackburn
Administrative Law Judge

[2] I note, however, that the United States Court of Appeals for the Seventh Circuit has since followed the First and is, thus, also in disagreement with the Tenth. *Lutheran Hospital of Milwaukee, Inc.*, 96 LRRM 2515 (1977).

[3] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

Respondent's Motion to Correct Typographical Errors in Administrative Law Judge's Decision.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD

Case 1-CA-11469, 1-CA-11479, 1-CA-11580, 1-CA-11581, 1-CA-11582, 1-CA-11661, 1-CA-12161

BETH ISRAEL HOSPITAL
and
MASSACHUSETTS HOSPITAL WORKERS UNION, LOCAL 880, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO

RESPONDENT'S MOTION TO CORRECT TYPOGRAPHICAL ERRORS IN ADMINISTRATIVE LAW JUDGE'S DECISION

Pursuant to Section 102.47 of the Rules and Regulations of the Board Series 8, as amended, Respondent hereby moves that the above entitled matter be transferred to Administrative Law Judge Blackburn for the limited purpose of correcting the following typographical errors:

Number "5" was improperly inserted at p. 2, L 4.

Number "10" was improperly inserted at p. 2, L 9.

Number "15" was improperly inserted at p. 3, L 14.

Apparently the insertion of the above numbers somehow relates to the printing scheme.

Respondent moves that the Administrative Law Judge correct the decision by deleting the numbers in order to avoid any misleading effects.

Respectfully submitted,
STONEMAN, CHANDLER & MILLER
By /s/ Robert Chandler
Robert Chandler
Attorneys for
BETH ISRAEL HOSPITAL

P. O. Address:
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January 3, 1977

FOR ARGUMENT

Supreme Court, U. S.
FILED
APR 6 1978
MICHAEL RODAK, JR., CLERK

No. 77-152

In the Supreme Court of the United States

OCTOBER TERM, 1977

BETH ISRAEL HOSPITAL, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statement	2
A. The Board's findings of fact	2
B. The Board's conclusions and order	8
C. The decision of the courtof appeals	10
Summary of argument	11
Argument	14
The Board properly concluded that the Hospital violated the National Labor Relations Act by issuing and enforcing no-solicitation/no-distribution rules that prohibit employees during non-working time from soliciting union support and distributing union literature in the hospital cafeteria and coffee shop	14
A. In extending the Act's protections to employees of non-profit hospitals in 1974, Congress intended the Board to apply settled principles to accommodate employer and employee rights concerning union solicitation and distribution	14
B. The Board properly concluded that the employees' Section 7 right to engage in union solicitation and literature distribution in the cafeteria and coffee shop outweighed any possible	

258-676—78——1

Argument—Continued
harm to patients, and therefore the burden was on the Hospital to show special circumstances justifying a ban on such activity ..... Page 23
C. The retail store/restaurant exception is inapplicable to a hospital cafeteria and coffee shop used primarily by employees 29
Conclusion 34

CITATIONS

Cases:
Bankers Club, Inc., 217 NLRB 22 30
Baylor University Medical Center v. *National Labor Relations Board*, C.A.D.C., No. 76–1940, decided February 14, 1978, 97 LRRM 2669 ..... 21, 23, 24, 25, 26, 27, 33–34
Bayside Enterprises, Inc. v. *National Labor Relations Board*, 429 U.S. 298 32
Bellaire General Hospital, 203 NLRB 1105 19
Central Hardware Co. v. *National Labor Relations Board*, 407 U.S. 539 15
Community Hospital of Roanoke Valley, Inc. v. *National Labor Relations Board*, 538 F. 2d 607 26
Essex International, Inc., 211 NLRB 749 15
Food Store Employees Local 347 v. *National Labor Relations Board*, 418 F. 2d 1177 16
Groendyke Transport, Inc. v. *National Labor Relations Board*, 530 F. 2d 137 16
Guyan Valley Hospital, Inc., 198 NLRB 107 19
James H. Matthews & Co. v. *National Labor Relations Board*, 354 F. 2d 432, certiorari denied, 384 U.S. 1002 16
Lutheran Hospital of Milwaukee, Inc. v. *National Labor Relations Board*, 564 F. 2d 208 ..... 21, 27, 31, 32

Cases—Continued
Marriott Corp. (Children's Inn), 223 NLRB 978 ..... Page 30
Marshall Field & Co., 98 NLRB 88, enforced as modified, 200 F. 2d 375 30
May Department Stores Co., 59 NLRB 976, enforced as modified, 154 F. 2d 533, certiorari denied, 329 U.S. 725 30
McDonald's of Palolo, 205 NLRB 404 30
National Labor Relations Board v. *Babcock & Wilcox Co.*, 351 U.S. 105 ..... 16, 25
National Labor Relations Board v. *Electro Plastics Fabrics, Inc.*, 381 F. 2d 374 26
National Labor Relations Board v. *Erie Resistor Corp.*, 373 U.S. 221 22
National Labor Relations Board v. *Local 103, Ironworkers*, No. 76–719, decided January 17, 1978 19
National Labor Relations Board v. *Magnavox Co.*, 415 U.S. 322 ..... 15, 16, 25
National Labor Relations Board v. *Monarch Machine Tool Co.*, 210 F. 2d 183, certiorari denied, 347 U.S. 967 ..... 16, 33
National Labor Relations Board v. *Peter Cailler Kohler Swiss Chocolates Co., Inc.*, 130 F. 2d 503 26
National Labor Relations Board v. *Seven-Up Bottling Co.*, 344 U.S. 344 19
National Labor Relations Board v. *Texas Aluminum Co., Inc.*, 300 F. 2d 315 16
National Labor Relations Board v. *Truck Driver's Union*, 353 U.S. 87 22
National Labor Relations Board v. *United Aircraft Corp., Pratt & Whitney Div.*, 324 F. 2d 128, certiorari denied, 376 U.S. 951 16

Cases—Continued

	Page
National Labor Relations Board v. *Weingarten, Inc.*, 420 U.S. 251	19, 22, 32
P. R. Mallory Co. v. *National Labor Relations Board*, 389 F. 2d 704	16
Peyton Packing Company, 49 NLRB 828	16
Republic Aviation Corp. v. *National Labor Relations Board*, 324 U.S. 793	15, 16, 22, 30, 32
St. John's Hospital and School of Nursing, Inc., 222 NLRB 1150	9, 12, 19, 20, 31
St. John's Hospital and School of Nursing, Inc. v. *National Labor Relations Board*, 557 F. 2d 1368	21, 23
Stoddard-Quirk Mfg. Co., 138 NLRB 615	16
Summit Nursing Convalescent Home, 196 NLRB 769, enforcement denied, 472 F. 2d 1380	19
William L. Bonnell Co. v. *National Labor Relations Board*, 405 F. 2d 593	26

Statutes:

National Labor Relations Act, as amended, (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C. (and Supp. V) 151, *et seq.*)	2, 11, 19
Section 2(14), 29 U.S.C. (Supp. V) 152(14)	2
Section 7, 29 U.S.C. 157	10, 11, 14, 15
Section 8(a)(1), 29 U.S.C. 158(a)(1)	6, 8
Section 8(a)(3), 29 U.S.C. 158(a)(3)	6, 8
Section 8(d), 29 U.S.C. (Supp. V) 158 (d)	19
Section 8(g), 29 U.S.C. (Supp. V) 158 (g)	19
Labor-Management Relations Act, Section 213(a), as added, 88 Stat. 396, 29 U.S.C. (Supp. V) 183	19

Miscellaneous:

	Page
Bok, *The Regulation of Campaign Tactics in Representation Elections under the National Labor Relations Act*, 78 Harv. L. Rev. 38 (1964)	30
120 Cong. Rec. 12936–12938 (1974)	18
120 Cong. Rec. 12937 (1974)	18
120 Cong. Rec. 16899–16900 (1974)	18
120 Cong. Rec. 16900 (1974)	17
H.R. Rep. No. 93–1051, 93d Cong., 2d Sess. (1974)	18
Legislative History of the Coverage of Non-Profit Hospitals Under the National Labor Relations Act, 1974, Senate Subcommittee on Labor of the Committee on Labor and Public Welfare (1974)	17–18, 19
S. Conf. Rep. No. 93–988, 93d Cong., 2d Sess. (1974)	19
S. Rep. No. 93–766, 93d Cong., 2d Sess. (1974)	18, 19
Vernon, *Labor Relations in the Health Care Field under the 1974 Amendments to the National Labor Relations Act*, 70 Nw. U. L. Rev. 202 (1975)	18

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-152

BETH ISRAEL HOSPITAL, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 49–59) is reported at 554 F. 2d 477. The decision and order of the National Labor Relations Board (Pet. App. 21–47) are reported at 223 NLRB 1193.

JURISDICTION

The judgment of the court of appeals was entered on April 29, 1977. The petition for a writ of certiorari was filed on July 27, 1977, and granted on January 16, 1978 (A. 143). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the National Labor Relations Board properly concluded that a hospital violated the National Labor Relations Act by issuing and maintaining rules that prohibit employees during non-working time from soliciting union support and distributing union literature in the hospital cafeteria and coffee shop.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

Petitioner Beth Israel Hospital (hereinafter "the Hospital") is a non-profit health care institution that employs 2,200 persons excluding house staff (residents and interns), attending physicians, students, and employees of Harvard University who work on the premises (Pet. App. 25; A. 28).[1] These employees live in widely scattered areas and must commute to work at the Hospital, which is located in a congested urban area (Pet. App. 38–39, 42; A. 21–22, 28).

Since May 1970, the Hospital has issued an employee handbook, entitled "Working Together," containing Hospital rules as to employee conduct, including the solicitation and distribution of literature on Hospital property (Pet. App. 25–26; A. 57–59). In July 1974, the Hospital revised its restrictions on solicitation and distribution of litera-

[1] The National Labor Relations Act was amended, effective August 25, 1974, to extend its coverage and protection to employees of non-profit health care institutions. 88 Stat. 395 (29 U.S.C. (Supp. V) 152 (14)).

ture,[2] promulgating the following rule, which remained in effect until the issuance of the Board's original complaint in this case (Pet. App. 28–29; A. 65–67):

> Hospital employees who want to solicit other employees for the Union or other causes may do so when they are not on their own working times, but only in two well-defined locations of the Hospital:
>
> (1) Employee-only areas—employee locker rooms and certain adjacent rest rooms; and
>
> (2) Cafeteria and coffee shop.
>
> In the locker areas literature may be offered. In the cafeteria and coffee shop, conversations may take place on a one-to-one basis but there is to be no setting up of special tables, public distribution of literature nor any form of coercion. Elsewhere within the Hospital, including patient-care and other work areas, the lobbies, corridors, elevators, libraries, meeting rooms, etc., there is to be no solicitation nor distribution of literature. Soliciting of patients and visitors is expressly prohibited at all times and places.

The Hospital's cafeteria and coffee shop, which are adjacent, are open to employees, patients, and visitors (Pet. App. 39; A. 7–8, 11–13, 45–48, 56, 59, 109, 122,

[2] The revisions were prompted by a decision of the Massachusetts Labor Relations Commission on an unfair labor practice charge that had been filed against the Hospital before it became subject to the National Labor Relations Act (Pet. App. 27).

253-676—78——2

123–125). These eating facilities are located on the second floor of the Hospital, where they are separated from the main lobby by a corridor. The cafeteria contains two serving lines, as well as a number of vending machines; it has a seating capacity of 275. The coffee shop also contains vending machines and has a seating capacity of 30 to 40 people. (Pet. App. 39; A. 7–9, 16–17, 56, 109, 111–114.) There is no employee-only eating facility in the Hospital (A. 13).

The coffee shop is open 24 hours a day, and the cafeteria is open at various times from 6:30 a.m. to midnight (Pet. App. 39; A. 7, 8–9, 28–29, 122).[3] A survey of cafeteria use conducted by the Hospital indicated that the average daily volume of individuals using the cafeteria serving lines is approximately 1,500 (A. 6–8). This survey also indicated that, of the meals served in the cafeteria, employees purchased 77 percent,[4] visitors 9 percent,[5] and patients only 1.56 percent (Pet. App. 39; A. 123–125).[6] Meals are pro-

[3] In the cafeteria, breakfast is served from 6:30 a.m. to 9:00 a.m.; lunch from 11:30 a.m. to 1:30 p.m.; and dinner from 4:00 p.m. to 6:30 p.m. The cafeteria service lines are also open from 9:00 a.m. to 9:45 a.m., for the morning coffee break, and also from 10:30 p.m. to midnight, primarily for the house staff (A. 7, 8–9, 28–29, 122).

[4] The employees are given a lunch period of 30 minutes and a ten minute relief or "coffee break" period in the morning and afternoon (A. 56).

[5] Normal visiting hours are from 2:30 p.m. to 8:00 p.m. (A. 8). The heaviest use of the cafeteria by visitors is in the evening (A. 123, 124).

[6] Students, volunteers, attending physicians and others purchased the balance of the meals served (A. 123–125).

vided to patients on the various floors of the Hospital; those patients using the cafeteria and coffee shop are reasonably ambulatory (Pet. App. 39; A. 38, 45–46, 121).

The Hospital utilizes the cafeteria area to communicate with the employees for a number of employee activities. Posters publicizing a Hospital cost reduction drive and charity campaigns have been placed in the area. In addition, tables have been set up to promote special campaigns and for the distribution of literature and pledge cards during the Hospital's annual United Fund drive.[7] A registration table has also been set up outside the north entrance of the cafeteria to assist employees who wished to join the Hospital credit union. Employee social functions have also been held by the Hospital in the cafeteria. (Pet. App. 33, 40; A. 5, 6, 9, 17, 22–28, 34, 43–44, 111, 113–115, 126.)[8]

On October 25, 1974, while the Hospital's no-solicitation/no-distribution rule was in effect, Ann Schunior, a Hospital research technician, distributed

[7] Since at least 1966, the Hospital, which is a constituent agency of the Combined Jewish Philanthropies, has allowed solicitation and distribution of literature for this charity and for the United Fund (Pet. App. 33; A. 9, 43–44, 50–51).

[8] The Hospital has also permitted a travel brochure rack to be set up in the cafeteria, and there is a table on which are placed commercial solicitations, such as brochures and applications for insurance programs, tennis camps, magazine subscriptions, and film processing. A car-pool board is also posted in the same corner of the cafeteria. (Pet. App. 33; A. 6, 12, 13–14, 38–39, 109, 112–113.)

an issue of "As We See It," a union newsletter,[9] in the cafeteria, on her lunch hour. She went from table to table and asked people whom she recognized or thought were employees whether they would like a copy of the newsletter. When Schunior was in doubt as to someone's employee status, she first asked if that person was an employee and explained that she was passing out literature for employees. (Pet. App. 31; A. 35, 37–38, 42.) [10]

While Schunior was distributing the union newsletter in the cafeteria, she was given an oral warning by the Hospital's general director that she was violating the Hospital's rules. Subsequently, she received written notification that further violations would result in dismissal. (Pet. App. 29, 32; A. 42, 73–75.)

On February 21, 1975, upon a charge filed by the Union, the Board's Regional Director issued a complaint alleging that the Hospital had violated Section 8(a)(1) and (3) of the National Labor Relations Act ("the Act"), 61 Stat. 140, 29 U.S.C. 158(a)(1) and (3), by promulgating and maintaining a rule that

[9] Schunior was distributing the October 1974 issue of a newsletter that was published monthly by the Massachusetts Hospital Workers Union, Local 880, Service Employees International Union, AFL–CIO (the "Union"). It contained articles by Hospital employees about their working conditions. (A. 42, 83–96.)

[10] Schunior testified that she was able to recognize the faces of people she saw regularly in the cafeteria, and that she was able to distinguish employees from patients and visitors because many employees wear uniforms and most of them wear Hospital name tags. She added that, while outpatients could not be readily distinguished from visitors, she could tell the employees from others in the cafeteria because visitors "generally look lost" and inpatients wear Hospital wrist bands and generally appear in their bedclothes. (Pet. App. 31; A. 36–38.)

barred distribution of union literature and restricted union solicitation in the cafeteria and coffee shop, and by applying that rule to Schunior (Pet. App. 24). Thereafter, the Hospital modified its rule to prohibit even one-to-one solicitation in the cafeteria and coffee shop.[11] Thus, under the revised rule, solicitation, like distribution of literature, is totally prohibited in the cafeteria and coffee shop area, and is limited to employee-only areas—employee locker rooms and certain adjacent rest rooms[12] (Pet. App. 30; A. 70–71).[12] The complaint was amended to include the Hospital's revised rule (Pet. App. 23).

[11] The new rule, set forth in a Hospital newsletter dated March 6, 1975, reads as follows (Pet. App. 30; A. 70–71):

"There is to be no soliciting of the general public (patients, visitors) on Hospital property. Soliciting and the distribution of literature to B.I. employees may be done by other B.I. employees, when neither individual is on his or her working time, in employee-only areas—employee locker rooms and certain adjacent rest rooms. Elsewhere within the Hospital, including patient-care and all other work areas, and areas open to the public such as the lobbies, cafeteria and coffee shop, corridors, elevators, gift shop, etc., there is to be no solicitation nor distribution of literature.

"Solicitation or distribution of literature on Hospital property by *non-employees* is expressly prohibited at all times.

"Consistent with our long-standing practices, the annual appeal campaigns of the United Fund and of the Combined Jewish Philanthropies for voluntary charitable gifts will continue to be carried out by the Hospital."

[12] Lockers are scattered throughout the Hospital in approximately 63 locations. However, in the employee-only areas, there are only four large locker rooms and two smaller rooms, containing 613 lockers, that are accessible to employees from all departments. In addition, there are locker areas, containing 470 lockers, which, because of security precautions, are accessible only to em-

B. THE BOARD'S CONCLUSIONS AND ORDER

The Administrative Law Judge concluded that the Hospital's restrictions on solicitation and distribution of literature in the cafeteria and coffee shop violated Section 8(a)(1) of the Act, and that the Hospital also violated Section 8(a)(3) and (1) by threatening employee Schunior with discharge if she continued to distribute literature in the cafeteria (Pet. App. 43). He found that the Hospital permitted solicitation in the cafeteria for non-union matters, that there were few places other than the cafeteria where employees could meet on Hospital premises to discuss non-work related matters, and that the surrounding neighborhood was congested and afforded no ready access to employees (Pet. App. 40–42). He added (Pet. App. 42):

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ployees who are assigned lockers there. Most of the locker locations are also restricted on the basis of sex. (Pet. App. 38; A. 30–33, 35–36, 127–134.)

The Hospital, itself, does not generally utilize the locker rooms and locker areas to communicate with employees (Pet. App. 38; A. 26, 35–36, 64, 71). Instead, newsletters containing communications from the Hospital's general director are distributed with the employees' paychecks in each department or work area (Pet. App. 32, 40; A. 21, 42–43). These newsletters have been used by the Hospital for a variety of solicitations (Pet. App. 40; A. 126, 135). They have also been used by the general director to express the Hospital's opposition to unionization and to respond to issues raised in the Union's monthly newsletter (Pet. App. 41; A. 61–64, 65–66). In one newsletter, for example, the general director stated that "a union has no place at Beth Israel Hospital" and that "the union's primary concern today is the thousands of dollars they will gain from employees' dues, dollars to come directly out of your pocket" (Pet. App. 41; A. 61–62).

> * * * I am not persuaded that the [Hospital] has offered any convincing evidence to demonstrate that the rule is needed, either by reason of actual or suspected interference with patients, visitors or non-employees. Thus, I am unable to find that the [Hospital] has made a sufficient showing of impairment with its principal obligation, namely, the care of patients, to justify the rule.

The Board upheld the Law Judge's findings and conclusions (Pet. App. 21–22). However, it added in a footnote, citing its intervening decision in *St. John's Hospital and School of Nursing, Inc.*, 222 NLRB 1150, that the Hospital "also violated Sec. 8(a)(1) by maintaining an overly broad no-solicitation, no-distribution rule that prohibited all solicitation and distribution in all areas to which patients and visitors have access and employees have access during non-working time other than immediate patient care areas" (Pet. App. 21–22, n. 2).[18]

The Board ordered the Hospital to "[r]escind its written rule prohibiting distribution of union literature and union solicitation in its cafeteria and coffee shop," to expunge from Schunior's personnel record the written warning issued to her because of her dis-

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[18] In *St. John's Hospital and School of Nursing, Inc.*, *supra*, the Board held that a hospital rule barring employee solicitation and distribution in any area to which patients and visitors have access was overly broad. Although such activities could be prohibited in immediate patient care areas, restrictions in other areas open to patients and visitors as well as off-duty employees were presumptively invalid.

tribution of union literature in the cafeteria, and to cease and desist from interfering "in any like or related manner" with its employees' rights under Section 7 of the Act, 29 U.S.C. 157 (Pet. App. 22, 44–45).

C. THE DECISION OF THE COURT OF APPEALS

The court agreed with the Board that the Hospital had failed to establish special circumstances justifying its prohibition on employee solicitation and distribution in the cafeteria and coffee shop, and it enforced the Board's order as applied to those areas (Pet. App. 54–56, 59). However, noting the absence of any record evidence pertaining to the impact of employee solicitation and distribution in other public areas, the court held that the Board's decision and order determined "no more than the status of the cafeteria and coffee shop" (Pet. App. 57–58). It therefore refused to interpret the Board's footnote citing *St. John's Hospital and School of Nursing, Inc., supra,* as expressing a Board determination that the Hospital rule was also invalid as applied to other areas not devoted to immediate patient care. The court accordingly held that the Hospital was not collaterally estopped from further litigating the validity of its rule in such areas (Pet. App. 50).[14]

[14] The application of the rule to these other areas is being litigated before the Board in a second case involving the Hospital. See *Beth Israel Hospital*, cases 1–CA–11469, et al., JD–846–77 (Pet. Br. 46–50).

The court also refused to enforce the Board's broad cease and desist order on the ground that no proclivity to violate the Act had been shown (Pet. App. 58–59).

SUMMARY OF ARGUMENT

Section 7 of the National Labor Relations Act guarantees to employees the right to "form, join, or assist labor organizations" or "to refrain" from such activities. This guarantee encompasses the right of the employee to be informed concerning that choice at the place of work.

However, Section 7 rights are not absolute, and the Board must work out an adjustment between the employees' right of self-organization and the equally undisputed right of employers to maintain discipline in their establishments. Thus, the Board, with court approval, has long held that an employer may lawfully adopt a rule prohibiting employee solicitation and distribution of literature during working time on his premises. But a similar rule prohibiting employee solicitation during non-working time, or distribution of literature during non-working time in non-working areas, is invalid unless the employer establishes that special circumstances make the rule necessary in order to maintain production or discipline.

Petitioner erroneously contends that, when Congress enacted the 1974 Health Care Amendments (88 Stat. 395), it intended that different principles as to no-solicitation/no-distribution rules would be applied to hospitals because of their patient care functions. While Congress recognized the need to avoid disruptions of patient care, it was also concerned that employees of non-profit hospitals should not be excluded from the

236-676—78——3

rights of self-organization guaranteed other employees under the Act. Accordingly, it relied on the Board to continue to make the necessary adjustments between the rights and interests of hospital employees, patients, and employers in this area.

In *St. John's Hospital and School of Nursing, Inc.*, 222 NLRB 1150, the Board struck a balance between these rights and interests. Recognizing that "the primary function of a hospital is patient care" (*ibid.*), the Board concluded that in immediate patient care areas, a hospital may be warranted in imposing more stringent restrictions on employee solicitation and distribution than are generally permitted under the Board's established principles. However, the Board also concluded that these general patient care considerations were not sufficient, alone, to justify a hospital's restrictions on employee organization activity in other areas accessible to patients and visitors. Accordingly, in other than immediate patient care areas, a ban on employee solicitation and distribution would be invalid absent a showing by the hospital that special circumstances made the ban necessary to maintain patient care or employee discipline. The present case involves only the validity of the *St. John's* rule as applied to hospital eating facilities.

The Hospital's cafeteria and coffee shop are used primarily by the employees, since there is no employee-only eating facility in the Hospital. These eating facilities are natural places for employees to talk about matters of mutual concern such as unions. Moreover, the employees lack other adequate areas for commu-

nication both inside and outside the Hospital. Thus, the harm to employee organization rights in banning solicitation and distribution in the cafeteria and coffee shop would be substantial. On the other hand, the likelihood that such activity would disturb the few patients and visitors using these facilities is minimal. A certain amount of noise and activity is inevitable in such semi-public eating facilities, and there is no more reason for hospital visitors or patients to be upset by employees discussing union activities or exchanging union literature among themselves in a quiet, non-disruptive manner, than by other solicitation activity permitted by the Hospital.

The Board therefore reasonably concluded that the Hospital's ban on employee solicitation and distribution in the cafeteria and coffee shop was presumptively unlawful and placed the burden on the Hospital to establish, by probative evidence, that such a ban was nonetheless necessary to maintain patient care or employee discipline. The Board and the court below properly concluded that the Hospital failed to sustain this burden.

The Hospital contends (Br. 30–34, 41–43) that its prohibition on solicitation and distribution of literature in the cafeteria and coffee shop must be judged by the same standards applied by the Board to retail stores and restaurants. But the Board has broad discretion to determine the applicability of such standards to varying factual situations. That discretion was properly exercised in concluding that the considera-

employees to be informed concerning that choice." "The place of work is a place uniquely appropriate for the dissemination of views concerning a bargaining representative and the various options open to the employees." *National Labor Relations Board* v. *Magnavox Co.*, 415 U.S. 322, 325; see also *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793, 801, n. 6.

However, Section 7 rights are not absolute. The Board must work out "an adjustment between the undisputed right of self-organization assured to employees * * * and the equally undisputed right of employers to maintain discipline in their establishments." *Republic Aviation Corp.* v. *National Labor Relations Board, supra*, 324 U.S. at 797–798. The Board, with court approval, has evolved, and long applied, the following principles in determining the legality of an employer's regulation of employee solicitation and literature distribution with respect to Section 7 matters on his premises: Since working time is for work, a rule prohibiting employee solicitation and distribution during working time[16] is presumptively

[15] As this Court stated in *Central Hardware Co.* v. *National Labor Relations Board*, 407 U.S. 539, 543: "[O]rganization rights are not viable in a vacuum; their effectiveness depends in some measure on the ability of employees to learn the advantages and disadvantages of organization from others. Early in the history of the administration of the Act the Board recognized the importance of freedom of communication to the free exercise of organization rights."

[16] "Working time" in this context means the period of time spent in the performance of actual job duties and does not include meal or break periods. *Essex International, Inc.*, 211 NLRB 749–750.

tions that warrant more stringent restrictions on employee solicitation and distribution in the public areas of retail stores and restaurants are not applicable to hospital eating facilities. The main function of such purely commercial establishments is selling their goods and services to their customers, and this function might well be disrupted by such employee activity in the places where the sales occur. In contrast, a hospital's main function is patient care, which is unlikely to be disrupted by employee solicitation and distribution in the hospital's eating areas. Such areas are for this purpose more closely analogous to plant lunchrooms and cafeterias, where employee solicitation and distribution during non-working time is protected by the Act.

ARGUMENT

THE BOARD PROPERLY CONCLUDED THAT THE HOSPITAL VIOLATED THE NATIONAL LABOR RELATIONS ACT BY ISSUING AND ENFORCING NO-SOLICITATION/NO-DISTRIBUTION RULES THAT PROHIBIT EMPLOYEES DURING NON-WORKING TIME FROM SOLICITING UNION SUPPORT AND DISTRIBUTING UNION LITERATURE IN THE HOSPITAL CAFETERIA AND COFFEE SHOP

A. IN EXTENDING THE ACT'S PROTECTIONS TO EMPLOYEES OF NONPROFIT HOSPITALS IN 1974, CONGRESS INTENDED THE BOARD TO APPLY SETTLED PRINCIPLES TO ACCOMMODATE EMPLOYER AND EMPLOYEE RIGHTS CONCERNING UNION SOLICITATION AND DISTRIBUTION

Section 7 of the National Labor Relations Act guarantees employees the right "to form, join, or assist labor organizations" or "to refrain" from such activities. Implicit in this guarantee is the right of

valid. On the other hand, since non-working time is an employee's time to use as he wishes, a rule prohibiting employee solicitation during non-working time, or distribution of literature during non-working time in non-working areas, is invalid, unless the employer establishes that special circumstances make the rule necessary in order to maintain production or discipline. *Republic Aviation Corp.* v. *National Labor Relations Board, supra,* 324 U.S. at 803, n. 10 (quoting with approval *Peyton Packing Company,* 49 NLRB 828, 843–844); *National Labor Relations Board* v. *Babcock & Wilcox Co.,* 351 U.S. 105, 113; *National Labor Relations Board* v. *Magnavox Co., supra,* 415 U.S. at 325–326; *Stoddard-Quirk Mfg. Co.,* 138 NLRB 615, 616–621.[17]

Petitioner does not dispute the validity of these principles as applied to facilities other than a hospital. Its basic contention is that Congress, in enacting the 1974 Health Care Amendments (note 1, *supra*), intended that different principles would be applied to hospitals. Thus, petitioner argues that "the unique

[17] Accord: *National Labor Relations Board* v. *United Aircraft Corp., Pratt & Whitney Div.,* 324 F. 2d 128, 129–131 (C.A. 2), certiorari denied, 376 U.S. 951; *National Labor Relations Board* v. *Monarch Machine Tool Co.,* 210 F. 2d 183, 186–187 (C.A. 6), certiorari denied, 347 U.S. 967; *P.R. Mallory Co.* v. *National Labor Relations Board,* 389 F. 2d 704, 709 (C.A. 7); *James H. Matthews & Co.* v. *National Labor Relations Board,* 354 F. 2d 432, 440–441 (C.A. 8), certiorari denied, 384 U.S. 1002; *National Labor Relations Board* v. *Texas Aluminum Co., Inc.,* 300 F. 2d 315, 316 (C.A. 5); *Groendyke Transport, Inc.* v. *National Labor Relations Board,* 530 F. 2d 137, 141–142 (C.A. 10); *Food Store Employees Local 347* v. *National Labor Relations Board,* 418 F. 2d 1177, 1180 (C.A.D.C.).

nature of a hospital places it outside the scope of the traditional area of NLRB labor relations expertise" (Pet. Br. 13), and that only the hospital "possesses the medical expertise required to determine what rules are necessary to preserve the medical well-being of persons under its care" (Pet. Br. 18). Accordingly, in order to give effect to Congress' concern with the need to avoid disruption of patient care (Pet. Br. 10–11), it is not necessary for a hospital "to demonstrate the existence of 'special circumstances' to justify its rule. * * * [T]he unique nature of a hospital setting is in and of itself a special circumstance justifying a restriction on solicitation and distribution activity. * * * The burden is on the Board to justify its decision holding that the Hospital violated the Act by enforcing that rule" (Pet. Br. 19). Petitioner's position is erroneous.

While the legislative history of the 1974 amendments shows a recognition by Congress of the unique nature of health care institutions and of the need " 'to avoid disruption of patient care wherever possible' " (Pet. Br. 11), it also reflects congressional concern that non-profit hospital workers, performing the same functions as covered employees,[18] should not be excluded from the rights and benefits of self-organization guaranteed employees under the Act. 120 Cong. Rec. 16900 (1974) (remarks of Rep. Ashbrook), Legislative History of the Coverage of Non-profit Hospitals

[18] Employees of proprietary hospitals and of proprietary and non-profit nursing homes were already covered by the Act.

Under The National Labor Relations Act, 1974, prepared by the Senate Subcommittee on Labor of the Committee on Labor and Public Welfare, 93d Cong., 1st Sess. 291 (1974) ("Leg. Hist."); S. Rep. No. 93–766, 93d Cong., 2d Sess. 3 (1974), Leg. Hist. 10; H.R. Rep. No. 93–1051, 93d Cong., 2d Sess. 4–5 (1974), Leg. Hist. 272–273. Indeed, the legislative history reflects the belief of Congress that extending the rights of self-organization to hospital employees would promote, rather than harm, patient care.[19]

Accordingly, though Congress enacted special provisions for strike notice and mediation in the health care industry, designed to avoid disruptions of patient

[19] See Vernon, *Labor Relations in the Health Care Field under the 1974 Amendments to the National Labor Relations Act*, 70 Nw. U. L. Rev. 202, 203–204 (1975): "Congress also believed the lack of unionization at * * * [non-profit] hospitals enabled them to maintain low wages and poor working conditions. This situation was thought to cause substantial employee frustration and turnover which, in turn, produced a low standard of care. Furthermore, the low wages and poor working conditions were considered the principal forces compelling employees to seek union representation and engage in disruptive strikes when hospital management denied them representation" (footnote omitted).

See also 120 Cong. Rec. 12936–12938 (1974) (remarks of Sen. Cranston and Sen. Williams), Leg. Hist. 91–97; 120 Cong. Rec. 16899–16900 (1974) (remarks of Rep. Thompson and Rep. Ashbrook), Leg. Hist. 288–291. Figures cited in the legislative history showed that two hospitals with annual employee turnover rates of 1200 to 1500 percent before unionization dropped to 24 to 30 percent a year after unionization. 120 Cong. Rec. 12937 (1974) (remarks of Sen. Cranston), Leg. Hist. 93–94; 120 Cong. Rec. 16899–16900 (1974) (remarks of Rep. Thompson), Leg. Hist. 289–290.

care through strikes,[20] it did not find it necessary, in the interest of patient care, to enact any statutory limitation on employee solicitation and distribution rights. Instead, Congress relied upon the Board to continue to exercise its pre-existing responsibility to make the necessary adjustments between the rights and interests of hospital employees, patients, and employers in this area.[21]

Accordingly, in *St. John's Hospital and School of Nursing, Inc.*, 222 NLRB 1150, the Board struck a balance between the organizational rights of hospital employees and the need of the hospital to maintain

[20] Section 8(d) and (g) of the National Labor Relations Act (29 U.S.C. (Supp. V) 158(d) and (g)), and Section 213(a) of the Labor-Management Relations Act (as added, 88 Stat. 396, 29 U.S.C. (Supp. V) 183). See S. Rep. No. 93–766, *supra*, at 4–5, 6, Leg. Hist. 11–12, 13; S. Conf. Rep. No. 93–988, 93d Cong., 2d Sess. 4–5 (1974), Leg. Hist. 355–356.

[21] There is no support for petitioner's contention (Pet. Br. 14–15) that Congress was aware of, and intended to "freeze" into law, *Guyan Valley Hospital, Inc.*, 198 NLRB 107 (1972), where a "tendency" to disturb patients was held sufficient to justify enforcement of a no-solicitation rule in public areas of a hospital. *Guyan* was decided by a divided 3-member panel of the Board. It stood in sharp contrast to another divided panel decision, *Summit Nursing Convalescent Home*, 196 NLRB 769 (1972), enforcement denied, 472 F. 2d 1380 (C.A. 6). See also *Bellaire General Hospital*, 203 NLRB 1105 (1973). Moreover the Board may properly modify its construction of the Act in light of its cumulative experience. See *National Labor Relations Board* v. *Local 103, Ironworkers*, No. 76–719, decided January 17, 1978, slip op. 15–16; *National Labor Relations Boards* v. *Weingarten, Inc.*, 420 U.S. 251, 265–267; *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 347–349, 350–352.

patient care." Recognizing that "the primary function of a hospital is patient care and that a tranquil atmosphere is essential to carrying out that function" (*ibid.*), the Board concluded that a hospital may be justified in imposing more stringent restrictions on employee solicitation and distribution of literature than are permitted under established principles. Thus, the Board held that a hospital may lawfully ban employee solicitation and distribution, even during non-working time, in all immediate patient care areas, such as the patients' rooms, operating rooms, and X-ray and therapy facilities. For, "[s]olicitation at any time in those areas might be unsettling to the patients—particularly those who are seriously ill and thus need quiet and peace of mind." *Ibid.*

However, the Board also concluded that these general patient care considerations were not sufficient, alone, to justify a hospital's restrictions on employee organizational activity in all other areas accessible to patients and visitors. The Board explained (222 NLRB 1150–1151):

> As to the restriction in visitor access areas other than those involved in patient care, the possibility of any disruption in patient care resulting from solicitation or distribution of literature is remote. As to the restrictions in patient access areas such as cafeterias, lounges, and the like, we do not perceive how patients would be affected adversely by such activities.

[22] *St. John's* was a unanimous decision by the full Board. The American Hospital Association and District 1199, National Union of Hospital and Health Care Employees, RWDSU, AFL–CIO, filed briefs *amici curiae* in that case. 222 NLRB 1150.

> On balance, the interests of patients well enough to frequent such areas do not outweigh those of the employees to discuss or solicit union representation.

Accordingly, in areas other than those devoted to immediate patient care, a ban on all employee solicitation and distribution would be invalid absent a showing by the hospital that special circumstances made the ban necessary in order to maintain patient care or employee discipline.

The present case involves only the validity of the *St. John's* principle as applied to hospital eating facilities. The court below found that the validity of the Hospital's rule as applied to the areas other than the cafeteria and coffee shop was not litigated in this proceeding (*supra,* p. 10), and the Board did not seek review of the court's ruling on that question. Accordingly, the question whether the same principle respecting employee solicitation and distribution in hospital eaing facilities may properly be applied to other areas to which patients have access, but which are not involved in direct patient care, is not presented in this case.[23]

[23] The Seventh Circuit has found the Board's *St. John's* principle to be "both logical and just," as applied to both hospital eating facilities and other patient access areas not devoted to immediate patient care. *Lutheran Hospital of Milwaukee, Inc.* v. *National Labor Relations Board*, 564 F. 2d 208, 215–216 (C.A. 7), petition for a writ of certiorari filed March 14, 1978. No. 77–1289. However, the accommodation reached by the Board as to both eating facilities and other areas has been rejected by the Tenth and the District of Columbia Circuits. *St. John's Hospital and School of Nursing, Inc.* v. *National Labor Relations Board*, 557 F. 2d 1368 (C.A. 10); *Baylor University Medical Center* v. *National Labor Relations Board*, C.A.D.C. No. 76–1940, decided February 14, 1978, 97 LRRM 2669.

In sum, the basic question here is whether the Board made a reasonable accommodation between employee organizational rights and the Hospital's need to maintain patient care in concluding that its ban on employee solicitation and distribution with respect to union matters in the cafeteria and coffee shop was an impermissible infringement of the employees' Section 7 rights, absent proof by the Hospital that special circumstances made such a ban necessary in order to maintain patient care or employee discipline.[24] We show below that the balance struck by the Board is reasonable, and thus entitled to stand. See *National Labor Relations Board* v. *Weingarten,* 420 U.S. 251, 267; *National Labor Relations Board* v. *Erie Resistor Corp.,* 373 U.S. 221, 236; *National Labor Relations Board* v. *Truck Driver's Union,* 353 U.S. 87, 96.

[24] Contrary to petitioner's contention (Pet. Br. 21) the Board is not required to "demonstrate by substantial evidence that it would be improper for the Hospital to enforce its rule in the cafeteria." The requirement that the Board's unfair labor practice findings be based on substantial evidence "does not go beyond the necessity for the production of evidential facts, * * * and compel evidence as to the results which may flow from such facts. * * * An administrative agency * * * may infer * * * from the proven facts such conclusions as reasonably may be based upon the facts proven." *Republic Aviation Corp.* v. *National Labor Relations Board, supra,* 324 U.S. at 800. It may also adopt presumptions, based on its cumulative experience, the validity of which "depends upon the rationality between what is proved and what is inferred." *Id.* at 805.

B. THE BOARD PROPERLY CONCLUDED THAT THE EMPLOYEES' SECTION 7 RIGHT TO ENGAGE IN UNION SOLICITATION AND LITERATURE DISTRIBUTION IN THE CAFETERIA AND COFFEE SHOP OUTWEIGHED ANY POSSIBLE HARM TO PATIENTS, AND THEREFORE THE BURDEN WAS ON THE HOSPITAL TO SHOW SPECIAL CIRCUMSTANCES JUSTIFYING A BAN ON SUCH ACTIVITY

The Hospital's cafeteria and coffee shop are used primarily by the employees, since there is no employee-only eating facility in the Hospital.[25] In contrast, patient use is relatively slight, since meals for patients are provided on the various floors of the Hospital.[26] As Judge Leventhal stated in *Baylor University Medical Center* v. *National Labor Relations Board, supra,* 97 LRRM at 2676 (dissenting opinion):

> It is only in the most general and noncritical sense that "patient care" is rendered in these areas. They are basically retreats, where patients, staff, and visitors may withdraw from immediate contact with patient care areas. They are natural places for employees to talk

[25] Cf. *St. John's Hospital and School of Nursing, Inc.* v. *National Labor Relations Board, supra,* where it was "stipulated that 80% or more of the employees use the employee-only lunchroom and cafeteria on a daily basis." 557 F. 2d at 1375. Indeed, the Tenth Circuit expressly distinguished the present case because of " 'the very substantial employee use of' the cafeteria and coffee shop and the apparent absence of comparable employee-only areas." *Id.* at 1376, n. 7.

[26] A survey of cafeteria use conducted by the Hospital shows that employees purchased 77 percent of the meals served, visitors 9 percent, and patients only 1.56 percent (*supra,* p. 4).

about matters of mutual concern such as unions. ["]

Indeed, the Hospital has used the cafeteria-coffee shop area to communicate with the employees and for a number of employee programs and social activities that were not related to patient care (*supra,* p. 5).

In addition, the cafeteria and coffee shop are the only areas of the Hospital where most of the employees could adequately be contacted while they were off-duty. As shown (*supra,* pp. 7–8, note 12), the locker rooms and rest areas, to which the Hospital rules would limit employee solicitation and distribution, are not accessible to the entire work force due to security restrictions and the division of locker areas by sex. The inadequacy of these areas for employee communication is further shown by the fact that the Hospital itself generally does not rely on the locker areas to dispense information to its employees. Instead, it depends upon its newsletters, which are distributed with paychecks in various work areas of the Hospital, and which have been used to express opposition to unionization.

[27] The court majority in *Baylor* did not disagree with this statement. While holding that "Baylor's ban on soliciting in the hospital corridors was justified due to the 'special circumstances' of a hospital environment," it held that "a similar proscription covering its cafeteria and vending area is justified because these areas are not materially 'special' or different from other restaurants and shops." *Baylor University Medical Center* v. *National Labor Relations Board*, *supra*, 97 LRRM at 2673. We show, *infra*, pp. 29–34, that the Board reasonably concluded that hospital eating facilities are different.

Finally, while the availability of alternative means of communication is not a relevant inquiry in the case of *employee* solicitation and distribution,[28] the building's surroundings also are inadequate for communicating with the employees due to the congested urban area in which the Hospital is located (Pet. App. 42; A. 18–21, 21–22)."[29]

The harm to employee organizational rights in banning solicitation and distribution in the cafeteria and coffee shop would thus be substantial. On the other hand, the likelihood that such activity would disturb the relatively few patients and visitors using those facilities is minimal. A certain amount of noise and activity is inevitable in such semi-public eating facilities. There is no more likelihood that hospital visitors or patients will be upset by employees discussing union activities or exchanging union literature among

[28] Cf. *National Labor Relations Board* v. *Babcock & Wilcox Co.*, *supra*, 351 U.S. at 113, where the existence of alternate means of communication was deemed a relevant consideration in striking the balance between the right of *non-employee* union representatives to organize on plant premises and the employer's interest in barring outsiders from his property. However, the Court emphasized that its decision was addressed to *non-employee* organizing activity and that "[n]o restriction may be placed on the *employees'* right to discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline" (emphasis added). See also *National Labor Relations Board* v. *Magnavox Co.*, *supra*, 415 U.S. at 326–327.

[29] Cf. *Baylor University Medical Center* v. *National Labor Relations Board*, *supra*, where the District of Columbia Circuit found that, while there were few indoor areas available for employee communication at this Dallas hospital, there were a number of outdoor areas surrounding the building that could be used "virtually all year" because of the mild climate. 97 LRRM at 2675.

themselves in a quiet, non-disruptive manner than that such persons will be upset by other conversations overheard in these areas or by other solicitation activity permitted by the Hospital.[20] As the Seventh

[20] The wide range of activities carried on in the Hospital cafeteria and coffee shop undermines the Hospital's claim that there is a legitimate need to prohibit union solicitation and distribution activities in these areas in the interest of maintaining a quiet, distraction-free atmosphere. The numerous charitable solicitations and commercial literature permitted in these eating facilities suggest that the Hospital, which has repeatedly expressed its opposition to unionization (A. 61–66), is quite willing to permit solicitation and distribution of literature, provided that it does not further employee self-organization. See *William L. Bonnell Co.* v. *National Labor Relations Board*, 405 F. 2d 593, 595 (C.A. 5); *National Labor Relations Board* v. *Electro Plastic Fabrics, Inc.*, 381 F. 2d 374, 376 (C.A. 4).

Petitioners suggest (Pet. Br. 35) that the solicitations permitted are "innocuous", while the employee solicitation and distribution of union literature is "potentially upsetting" (cf. *Baylor University Medical Center* v. *National Labor Relations Board*, *supra*, 97 LRRM at 2672 n. 29). But such things as posters urging employee efforts to reduce the Hospital's costs (A. 23–28) have at least an equal potential for upsetting patients prone to worry about the quality and cost of the care they are receiving as do overheard conversations concerning unionization, or the sight of the distribution of union literature. In fact, neither is likely to upset the few patients who are exposed to such matters. Indeed, even if the union newsletter were inadvertently to fall into patient hands, patients would necessarily have their own experiences against which to check the accuracy of the complaints about hospital procedures. Of course, statements in union newsletters expressing dissatisfaction with working conditions (see Pet. Br. 26–28), made as part of the employees' organizing efforts, fall within the protection of Section 7 of the Act. See *Community Hospital of Roanoke Valley, Inc.* v. *National Labor Relations Board*, 538 F. 2d 607, 608–610 (C.A. 4); *National Labor Relations Board* v. *Peter Cailler Kohler Swiss Chocolates Co., Inc.*, 130 F. 2d 503, 506 (C.A. 2).

Circuit has noted, "[l]abor unions are common entities in this country, and only an extraordinary patient would be so dismayed at witnessing an attempt to form one that his health would actually become impaired." *Lutheran Hospital of Milwaukee, Inc.* v. *National Labor Relations Board, supra,* 564 F. 2d at 215. A conversation concerning union representation would appear to be far less disturbing for a patient to overhear than would a discussion among doctors or nurses about the medical questions that are the subject of many off-duty conversations (A. 137–138).[21]

The Board therefore reasonably concluded that the Hospital's ban on employee solicitation and distribution in the cafeteria and coffee shop was presumptively unlawful and correctly placed the burden on the Hospital to establish, by probative evidence, that such a ban was nonetheless necessary to maintain patient care or employee discipline. The Board and the court below properly concluded that the Hospital did not sustain that burden.[22]

[21] The record shows that surgeons and students occasionally meet in the Hospital's cafeteria during breakfast to discuss medical questions (A. 52–53).

[22] Petitioners incorrectly suggest (Pet. Br. 30) that the decision below "would require the Hospital to demonstrate actual harm, i.e., a set-back in the recovery of a patient" in order to carry its burden. Instead, the court simply noted that the Hospital had shown no special circumstances, such as irresponsible employee behavior or overcrowded conditions, which would reasonably tend to show that patient care would be disrupted (Pet. App. 55; cf. *Baylor University Medical Center* v. *National Labor Relations Board*, *supra*, 97 LRRM at 2672).

The record shows (*supra*, pp. 5–6) that employee Schunior was careful not to include patients and visitors as recipients when she distributed union literature in the cafeteria. She was able to distinguish Hospital employees from patients and visitors,[33] and when in doubt she asked whether an individual was a Hospital employee before offering that person any union literature.

All that the Hospital offers in justification of its rule is the assertion (Pet. Br. 28–29) that it cannot take the risk that other employees will be as careful as Schunior was.[34] The court below properly found that this was insufficient to sustain the Hospital's burden of establishing special circumstances (Pet. App. 55–56):

[33] Most Hospital employees wear uniforms and name tags, and inpatients wear Hospital I.D. bracelets (A. 37–38, 48, 121).

[34] Nothing in the Board's decision or the court's enforcement of it limits the Hospital's authority to discipline employees engaging in solicitation and distribution of literature when they act in a disorderly or disruptive manner that disturbs patients, visitors, or other employees in any area of the hospital. Such behavior, whether related to union activity or not, can be adequately controlled under the Hospital's other established rules as to employee conduct (A. 57–59), without limiting employee organization rights in the cafeteria and coffee shop. In addition to restricting solicitation and distribution of literature on the Hospital premises, these rules prohibit "[i]mproper conduct towards patients or employees and interfering with their assigned work" (A. 57). Moreover, it is also a violation of these rules to engage in disorderly conduct on Hospital premises, to leave one's work station or department during working hours without prior permission, to enter restricted areas, such as operating rooms, without permission, and to loiter on the premises before or after working hours (A. 57–58).

> Beth Israel argues that its no-distribution rule will prevent the unions' "scurrilous" attacks on the hospital's health care from falling into the hands of patients or visitors. There was no evidence, however, that literature, offensive or otherwise, was distributed to patients or visitors. Employee Schunior testified that she took care to distribute only to employees. If in the future employee organizers deliberately distribute "scurrilous" literature to patients or visitors, the hospital may well have cause to discipline such employees. Cf. *NLRB* v. *Local 1229, IBEW* (*Jefferson Standard Broadcasting Co.*), 346 U.S. 464 (1953). In any event, the hospital cannot justify a rule prohibiting distribution to employees of all types of literature on the ground that some of the literature may be scurrilous. Such an argument might at most justify a rule directed at offensive literature. We conclude that the Board did not err in finding that the hospital had not justified its no-solicitation, no-distribution rule as it related to the cafeteria and coffee shop. [Footnote omitted.]

C. THE RETAIL STORE/RESTAURANT EXCEPTION IS INAPPLICABLE TO A HOSPITAL CAFETERIA AND COFFEE SHOP USED PRIMARILY BY EMPLOYEES

The Hospital contends (Br. 30–34, 41–43) that its prohibitions on solicitation and distribution of literature in the cafeteria and coffee shop must be judged by the same standards applied by the Board to retail stores and commercial restaurants. In the retail store context, the Board has held that employers may pro-

hibit solicitation on the selling floor, where it may be "disruptive of the * * * [store's] business"; and in public aisles, elevators, and escalators, where "solicitation carried on in such limited space may create traffic and safety hazards tending to disrupt and interfere with * * * [the] business to a serious degree." *May Department Stores Co.*, 59 NLRB 976, 981, enforced as modified, 154 F. 2d 533, 537 (C.A. 8), certiorari denied, 329 U.S. 725;[35] *Marshall Field & Co.*, 98 NLRB 88, 92, enforced as modified, 200 F. 2d 375 (C.A. 7). Likewise, in commercial restaurants, prohibitions on solicitation and distribution of literature in public areas have been upheld because such activities are likely to have an adverse effect on customer patronage. See *Marshall Field & Co., supra,* 98 NLRB at 94; *McDonald's of Palolo,* 205 NLRB 404, 407–408; *Bankers Club, Inc.* 218 NLRB 22, 27; *Marriott Corp. (Children's Inn)*, 223 NLRB 978.

[35] Although in *May Department Stores, supra,* 59 NLRB at 981, the Board stated that "solicitation * * * carried on on the selling floor, where customers are normally present, might conceivably be disruptive of the respondent's business," it did not thereby hold, as the Hospital argues (Br. 24, 30), that employers generally may prohibit any solicitation or distribution that could "conceivably be" harmful to their operations. Such a holding would be inconsistent with the rule later approved by this Court in *Republic Aviation Corp.* v. *National Labor Relations Board, supra,* 324 U.S. at 803, n. 10, that prohibitions on employee solicitation and distribution during nonworking time are presumptively unlawful unless the employer can demonstrate the existence of special circumstances that, in fact, make the prohibition necessary to the orderly and efficient operation of the business. This rule has "proved to be among the most stable and least disputed of all those provided by the Board." Bok, *The Regulation of Campaign Tactics in Representation Elections under the National Labor Relations Act*, 78 Harv. L. Rev. 38, 93 (1964).

The Board has not applied these precedents to such areas as the Hospital's cafeteria and coffee shop because, in its considered judgment, the considerations that warrant the exception are not applicable to those areas. As the Board explained in *St. John's Hospital and School of Nursing, Inc.,* 222 NLRB 1150–1151, n. 3:

> [R]etail stores are justified in prohibiting solicitation on the selling floor since such solicitation, even on nonwork time, would be disruptive of the store's relationship with its customers in the pursuit of its main function, i.e., selling merchandise. [The hospital's] basic function is patient care. It has not been shown that the prohibitions here discussed are necessary to avoid disruption of that function.

As the Seventh Circuit added in *Lutheran Hospital of Milwaukee, Inc.* v. *National Labor Relations Board, supra,* 564 F. 2d at 214 (footnote omitted):

> A retail store's or a restaurant's primary function is selling merchandise. The sales floor of a store and the public area of a restaurant are where either business carries out the sale of merchandise, and are also where the public deals with the employees in their professional capacity. Thus, insofar as union organizational activities create an abnormal atmosphere on the sales floor or in the public areas, they interfere with the employees' job performance and disrupt the store or the restaurant's performance of its primary function.
>
> By contrast, the primary function of a hospital is to provide health care, and the areas of

> a hospital outside of immediate patient care areas are by definition not locations where the hospital's primary function is carried out or where the public deals with the employees in their professional capacity. Thus, while organizational activities conducted outside of immediate patient care areas might create an abnormal atmosphere where they took place, they would not interfere with the employees' job performance and therefore could not disrupt the hospital's performance of its primary function.

It is well established that the Board has broad discretion in drawing such distinctions, for "[the] Act left to the Board the work of applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms." *Republic Aviation Corp.* v. *National Labor Relations Board, supra,* 324 U.S. at 798. See also *Bayside Enterprises, Inc.* v. *National Labor Relations Board,* 429 U.S. 298, 302–304; *National Labor Relations Board* v. *Weingarten, Inc., supra,* 420 U.S. at 266–267.[36] For the reasons set forth above, the

[36] As the Seventh Circuit added in *Lutheran Hospital of Milwaukee, Inc.* v. *National Labor Relations Board, supra,* 564 F. 2d at 214–215: "It is the Board's function to determine the applicability of the National Labor Relations Act to working conditions in a particular industry in light of the special conditions present in that industry, and it is not our role to 'insure an abstract and academic consistency in Board decisions' which draw distinctions between various industries. If the individual decision of the Board which is before us for review is supported by substantial evidence and based on correct legal reasoning, we must enforce it" (citations omitted).

court below properly concluded (Pet. App. 54, n. 2), that the Board's refusal to extend the retail store/restaurant exception to hospital eating facilities rests on rational grounds. Similarly, it is entirely rational for the Board to determine that hospital eating facilities are instead analogous to plant lunchrooms and cafeterias, where it is well-established that solicitation and distribution of literature during non-working time is generally privileged. See, *e.g., National Labor Relations Board* v. *Monarch Machine Tool Co., supra,* 210 F. 2d at 186–187.

Nor is a different conclusion required by petitioner's contention (Br. 44) that, irrespective of profit, the Hospital has an "independently valid interest" in the successful operation of the cafeteria. Cf. *Baylor University Medical Center* v. *National Labor Relations Board, supra,* 97 LRRM at 2674. The principal customers of the Hospital cafeteria are the employees, who have no other eating facility on the premises and who naturally regard the cafeteria as an area where they may discuss matters of mutual concern when they are off duty. To the limited extent that patients and visitors also patronize this eating facility, they do so because of its convenient location, not because of the quality of the food or ambience.[37]

In sum, as Judge Leventhal pointed out (*Baylor University Medical Center* v. *National Labor Rela-*

[37] The Hospital's recognition of this fact is demonstrated by its use of the cafeteria as a place for charitable solicitations and the display of commercial literature. See p. 5, note 8, *supra.*

tions Board, supra, 97 LRRM at 2676 (dissenting opinion)):

> To be sure, the hospital has a legitimate interest in a congenial atmosphere in its cafeteria—but it is not the kind of live-or-die imperative that must be given recognition even though it undercuts the rights of employees protected by the general *Republic* principle.
>
> * * * * *
>
> [T]he statute does not fairly contemplate that a hospital can confine its employees to the closets, and deny them protection in the places most natural for talk that is not patient-related, by leaning on the exception wrought for commercial enterprises to ensure survival.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APRIL 1978.

U.S. GOVERNMENT PRINTING OFFICE: 1978

intervenor's brief

SUBJECT INDEX

	Page
Opinions Below, Jurisdiction and Statutes Involved	1
Question Presented	1
Statement of the Case	2
A. Introduction	2
B. The Facts	4
C. The Opinions Below	8
Argument	9
I. The Board Correctly Determined That Petitioner's Rule Prohibiting Solicitation and Distribution Is Unlawful Under the Principles Which Have Been Approved by This Court	9
A. *The General Principles Governing Employer Rules Which Limit or Ban Union Solicitation and Distribution*	9
B. *These General Principles Are Applicable to Hospitals and Require Invalidation of Petitioner's Rule*	11
II. The 1974 Amendments and Their Legislative History Establish That the Board Was Not Required to Adopt Special Policies Limiting the Rights of Hospital Employees to Communicate With Respect to Union Organization	20
Conclusion	29

TABLE OF AUTHORITIES

Cases:

American Ship Bldg. v. *Labor Board*, 380 U.S. 300	19
Bellaire General Hospital (Monterey Life Systems), 203 NLRB	28

Page

Goldblatt Bros., Inc., 77 NLRB 1262 .....14, 15

Golden State Bottling Co. v. *NLRB*, 414 U.S. 168 16

Guyan Valley Hospitals, Inc., 198 NLRB 107 27

I. F. Sales Co., 82 NLRB 137, enforced 188 F.2d 931 (C.A. 6) 14, 15

In re Peyton Packing Co., 49 NLRB 828 .....10, 14, 15

Lutheran Hospital of Milwaukee v. *National Labor Relations Board*, 564 F.2d 208 .....13, 17

May Dept. Stores Co., 59 NLRB 967, enforced as modified, 154 F.2d 533 (C.A. 8), cert. denied, 329 U.S. 725 .....14, 15

Monarch Machine Tool Co., 102 NLRB 1242, enforced 188 F.2d 931 (C.A. 6) 14, 15

NLRB v. *Fleetwood Trailer Co.*, 389 U.S. 375 20

NLRB v. *Great Dane Trailers*, 388 U.S. 26 12

NLRB v. *Ironworkers, Local 103*, 46 U.S.L.W. 4081 20

NLRB v. *Magnavox Co.*, 415 U.S. 322 .....9, 10, 18

NLRB v. *Pipefitters*, 429 U.S. 507 20

Republic Aviation Corp. NLRB, 324 U.S. 793 ....10, 12, 15

St. John's Hospital & School of Nursing, Inc., 222 NLRB 1150, enforcement denied, 557 F.2d 1368 (C.A. 10) 11

Summit Nursing Home, Inc., 196 NLRB 769, enforcement denied, 472 F.2d 1380 (C.A. 6) 19, 20

Thomas v. *Collins*, 324 U.S. 516 19

United States v. *New York, N.H. & H.R. Co.*, 355 U.S. 253 12

William L. Bonnell Co., 164 NLRB 110 19

Page

RULES:

Supreme Court Rules, Rule 40(e) 2

STATUTES:

National Labor Relations Act, as amended, 29 USC § 151 *et seq.*:

§ 1 18

§ 7 .....18, 19, 20

§ 8 19

§ 8(a)1 .....19, 28

§ 8(a)3 19

§ 8(d) 21, 24

§ 8(g) 21, 24

MISCELLANEOUS:

H.R. Rep. No. 93-1051, 93d Cong. 2d Sess. 21, 23, 24, 25

Hearings before the Subcommittee on Labor & Public Welfare, United States Senate, 93d Congress, 1st Sess., on S. 794 28

Legislative History of the Coverage of Non-Profit Hospitals under the National Labor Relations Act, 1974 .....20, 21, 22, 23, 26

New York Times, Monday, April 3, 1978 17

S. Rep. No. 93-766, 93d Cong. 2d Sess. 21, 23, 24, 25

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-152

BETH ISRAEL HOSPITAL,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

MASSACHUSETTS HOSPITAL WORKERS' UNION LOCAL 880, SERVICE EMPLOYEES' INTERNATIONAL UNION,

Intervenor.

BRIEF FOR THE UNION

OPINIONS BELOW, JURISDICTION AND STATUTES INVOLVED

The citations to the opinions below and the basis of the Court's jurisdiction are set forth at pp. 1-2 of the Brief for Beth Israel Hospital (hereinafter "Pet. Br."). The statutes involved are set out at Pet. Br. 2-3.

QUESTION PRESENTED

Whether the National Labor Relations Board properly determined that a hospital employer violated the National Labor Relations Act by an absolute ban on union solicitation and distribution of union literature in a cafeteria of the hospital where:

(a) 77% of the users of the cafeteria were employees, 12% were physicians, volunteers and others who worked for the hospital, 10% were visitors and only 2% were patients;

(b) the employer proffered no evidence that the forbidden union solicitation or distribution had or would have any adverse effect on patients; and

(c) the Board found (and the Court of Appeals sustained the finding) that the employer routinely permitted non-union solicitation and the distribution of non-union materials in the cafeteria.

STATEMENT OF THE CASE

A. Introduction

Rule 40(e) of this Court provides that the brief of an appellant or petitioner on the merits shall contain "A concise statement of the case containing all that is material to the consideration of the questions presented * * *". These materials are generally understood to include the pertinent record evidence and the findings which underlie the conclusions of the tribunals whose decisions are under review. To be sure, if the statement is to be "concise", it must be selective, and the advocate's perspective may, within reason and fairness, guide the inclusion or exclusion of particular materials. But it is striking that in this instance petitioner has chosen to select *out* all of the record evidence (with the single exception of the Hospital's rule itself, see Pet. Br. 5, n.1),[1] and all of the Administrative Law Judge's findings

[1] The no-solicitation/no distribution rule presently before the Court is a *revised* rule put into effect after the charges herein were filed; this rule not only prohibits distribution of literature and certain kinds of solicitation in the cafeteria and coffee shop areas but also "prohibit[s] 'one-to-one/solicitation'" between employees in those areas. (Pet. Br. 4.) Petitioner states that the rule was made more stringent "in order to obtain from the Board a complete delineation of the parameters for no-solicitation and no-distribution rules in public areas of a non-proprietary hospital . . ." (Pet. Br. 4), and represents that the change was merely a reversion to the rule in effect prior to intervention by the Massachusetts Labor Relations Commission (Pet. Br. 40). In fact, it appears that the original rule, promulgated in 1970, did permit some forms of "solicitation"; the rule allowed "Petitions, discussions; etc. amongst Hospital personnel . . . on a person to person basis at coffee breaks, mealtimes, or after the working hours of all those involved . . ." and, during working hours, "ordinary conversations, discussions, etc. which do not interfere with the work or the rights of others" were allowed." (App. 60). Even after the advent of the Union, the hospital's first position was that "employees should feel free to discuss anything with anyone outside of working and patient care areas and outside of working hours." (App. 62). After the state litigation, the Employer restated its rule as to solicitation (as opposed to distribution) as follows:

> "[A]s has always been our policy, employees may continue to discuss any matter, including unions, during specified non-work times and may engage in such discussions with fellow employees also not at work in employee only areas or in areas where patients, visitors and employees not on duty are permitted to congregate and intermingle, *such as the cafeteria and coffee shop.*" (App. 65, emphasis supplied.)

See also App. 67:

> "In the cafeteria and coffee shop, conversations may take place on a one-to-one basis but there is to be no setting up of special tables, public distribution of literature, nor any form of coercion".

Thus, it is plain that the prohibition of "one-to-one solicitation" in the cafeteria and coffee shop by employees—that is, apparently, or applied to union organization, simple private discussions among employees in which one employee tries to persuade the other of

which were approved by the Board, and in turn by the Court of Appeals. Thus, petitioner presents to this Court an abstract question of law, and asserts an absolute right of hospitals to bar union solicitation and union distribution in all areas to which patients have access. The reason for petitioner's litigation strategy will readily appear when the facts found by the Board are considered.

B. The Facts

Beth Israel Hospital employs approximately 2200 persons. (App. 28). It maintained, at the time this case arose, a cafeteria and a coffee shop; these were the only facilities on the premises available to employees who wished to purchase meals.[2] (App. 13). Although these facilities were open at most times [3] to anyone on the premises, including patients and visitors, about 77% of those using the facilities were regularly employed at the hospital. (App. 124).[4] Another 12%, approximately, were other persons working at the hospital in some capacity—students, volunteers, attending physicians, women's auxiliary members, and private duty nurses. (*Id.*) Less than 2% of the cafeteria users and coffee shop users were patients, and less than 10% were visitors. *(Id.)*

Employees often discussed their work with each other in the cafeteria, and that discussion sometimes involved comments critical of patient care. (App. 40) The cafeteria and coffee shop were regularly used by organizations (including the hospital itself) and individuals seeking to reach a broad cross-section of hospital employees as an area for posting notices, distributing literature, setting up informational tables, and soliciting contributions.

> "Thus, during March posters publicizing the hospital's 'buck a day' program, a cost reduction effort, were

his or her view concerning the need for union—was begun for the first time in 1975, and was *not* the same rule put into effect in 1970 before unionism became an issue in the hospital.

[2] "A modern cafeteria is provided for all employees where nutritious, well prepared meals may be purchased at reasonable prices. The Coffee Shop is open 24 hours per day to provide light refreshments for personnel, house staff and guests." (Employers Handbook, App. 55)

[3] Between 10:30 and 12 p.m., a midnight supper is served for employees only. (App. 28-29.)

[4] Some of these persons were paid by Harvard University rather than by Beth Israel Hospital. (*Id.*)

> displayed in the cafeteria. A travel brochure rack is situated adjacent to the nonofficial bulletin board, a car pool board is posted in the same area, and during National Nutrition Week a table was set up in the cafeteria on which was placed literature concerning nutritional ideas . . . Moreover, from time to time certain commercial literature has appeared on a table underneath the nonofficial bulletin board * * * [5] Since at least 1966, the hospital has permitted solicitation for the United Fund and for the Combined Jewish Philanthropies at tables set up in the cafeteria for the distribution of pledge cards. Also, there is evidence of similar distribution of newsletters giving information concerning the establishment of a credit union for employees, inviting volunteers to provide medical assistance to Israel, and patient information booklets; on occasion, there have been collections for employee gifts on such occasions as weddings, births and so forth. . . ." (223 NLRB at 1196).

There is no evidence in the record to indicate that any effort was ever made to curtail any of these activities pursuant to the no-solicitation/no distribution rule.

There was evidence presented as to one particular incident concerning application of the no-solicitation/no-distribution rule to union solicitation.[6] Ms. Anne Schunior, an employee, passed out a union newsletter, "As We See It", in the cafeteria, and was consequently issued a disciplinary warning (App. 73-75). Ms. Schunior testified that she could generally tell the difference between employees and other

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[5] This literature included tennis camp advertisements, magazine subscriptions, film envelopes, and insurance applications (App. 6).

On the non-official bulletin, located in the cafeteria, "notices and posters listing activities not officially sponsored by the Hospital may be placed" without any official approval. (App. 59).

[6] The rule in question at the time of this incident was the less stringent rule permitting "one-to-one" solicitation in the cafeteria and coffee shop.

people eating in the cafeteria.[7] Among the differences Ms. Schunior noted between employees and other diners were: employees are supposed to wear name tags and generally do; many employees wear uniforms; employees eat in the cafeteria daily and are recognizable by other employees after a while; employees eat in groups, while visitors often do not; inpatients wear wristbrands and, sometimes, are dressed in bedclothes. Before distributing literature to a few people whose employee status she was not sure of, she "asked if they were employees, and explained that she was passing out literature for employees". (App. 38).

Moreover, the hospital itself distributed a newsletter to employees, which sometimes contained discussion of the unionization issue and which was received by employees at their work stations (App. 21, 61-70). And, the hospital, in a newsletter distributed to visitors to the hospital, published material which could certainly be unsettling to some people—for example, an article about rising rape statistics, with a "red headline entitled 'RAPE, RAPE' " (223 NLRB at 1198).

Under the revised no-solicitation/no distribution rule here pertinent, neither oral solicitation of any kind nor distribution of union literature was permitted except in "employee locker rooms and certain adjacent restrooms."[8]

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[7] This testimony—that it is possible for a careful employee organizer to limit distribution in the cafeteria to employees—was credited by the ALJ (223 NLRB, at 1195) and was, in fact, essentially uncontradicted. That is, while the hospital personnel director stated that she herself could not *necessarily* distinguish employees from non-employees, she agreed that she could do so in many instances—by personal acquaintance or recognition, by the wearing of name tags, and because in-patients wear identification bracelets (App. 48, 52).

[8] The hospital is in a congested area (App. 22); it does not appear that there are any outdoor grounds at all, and while the record is not clear in this regard, it seems that the only employee parking lot

Because many employees' lockers are not in locker rooms, but, rather, in areas to which there is public access, and because several employee locker rooms are security areas to which only the particular employees assigned are allowed entry, only 613 lockers are located in the areas in which free solicitation and distribution of union literature by any employee are allowed (223 NLRB at 1197, App. 30, *et seq.*). Thus, under the hospital's rule, employees seeking to discuss the union question with other employees, or to distribute union literature were likely to reach at best a minority of the 2200 employees at the common place of work.

Also noteworthy is what the record does *not* show. Although "one-to-one" union solicitation was allowed in the cafeteria and coffee shop for a time, there is no evidence that any patient or visitor was ever disturbed thereby. While the union newsletter did contain much material critical of patient care at Beth Israel, there is no evidence whatever that any union newsletter ever came into the possession of any patient or visitor. There was also no testimony, medical or otherwise, concerning whether union solicitation or distribution alone, in a noisy cafeteria in which there are many conversations going on between employees and several other kinds of notices, solicitation and distribution of literature occurring, is likely to upset patients.[9]

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at the time of the events giving rise to this case was several blocks away and was used by employees of several hospitals in the area, not by Beth Israel employees alone. (App. 29).

[9] There was some evidence that patients have been upset by *other* kinds of conversations in the cafeteria—specifically, conversations which draw upon private information concerning individual patients. (App. 138-140). Nonetheless, although staff doctors have been politely asked to "[p]lease be mindful of the potential impact of your comments" (App. 139), such indiscretions are *not* listed as a ground for discharge of employees, as is violation of the no solicitation/no distribution rule and no rule regarding such conversations has apparently been promulgated with regard to em-

C. The Opinions Below

The Administrative Law Judge, whose rulings, findings, and conclusions were as pertinent here affirmed by the Board, held, on the basis of the foregoing facts that "the Employer's according of 'solicitation privileges to non-union matters while withholding them when union matters were involved is disparate treatment forbidden by the Act.' " (223 NLRB at 1198.) He rejected the argument that this discrimination was somehow justified by the need to keep controversial matters from patients and visitors, noting that the hospital itself distributed literature on the union question in work areas, and distributed directly to visitors material which could be controversial. (*Id.*) Therefore, he "was not persuaded that the Respondent has offered any convincing evidence to demonstrate that the rule is needed either by reason of actual or suspected interference." *(Id.)*

The Court of Appeals, noting that "[r]ules which prohibit union solicitation on the employer's property during non-working time in any location have been held to be presumptively unreasonable in the absence of special circumstances * * * the rules prohibiting distribution of literature are likewise * * * presumptively invalid if applied during non-working time in non-working areas" (554 F.2d at 480) held, first, that "[t]he burden * * * was on the hospital to show special circumstances," and, second, that "on this record * * * the Board was [not] compelled to hold that Beth Israel met this burden." *(Id.)* As to the arguments that the literature distributed might upset patients, the Court noted that the hospital may not "assume that irresponsible behavior will be the norm," and, in fact:

> "[t]here was no evidence that literature, offensive or otherwise, was distributed to patients or visitors. * * * If in the future employee organizers deliberately distribute 'scurrilous' literature to patients or visitors, the hospital may well have cause to discipline such employees. In any event * * * [the hospital's] argument might at most justify a rule directed at offensive literature." (*Id.*, at 481.)

ployees generally (App. 58). Such conversations continue to occur (App. 40, 53).

ARGUMENT

I. The Board Correctly Determined That Petitioner's Rule Prohibiting Solicitation and Distribution Is Unlawful Under the Principles Which Have Been Approved by This Court.

A. *The General Principles Governing Employer Rules Which Limit or Ban Union Solicitation and Distribution.*

Under the common law an employer was free without any limitation to discipline an employee because he talked to another employee on company property, because he distributed a leaflet, or because of the subject matter of the discussion or distribution. The National Labor Relations Act placed a significant limitation on that employer power. As this Court stated in its most recent decision in point:

> "The place of work is a place uniquely appropriate for dissemination of views concerning the bargaining representative and the various options open to the employees. So long as the distribution is by employees to employees and so long as the in-plant solicitation is on nonworking time, banning of that solicitation might seriously dilute § 7 rights. For Congress declared in § 1 of the Act that it was the policy of the United States to protect 'the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing.' " (*NLRB* v. *Magnavox Co.*, 415 U.S. 322, 325-326.)

Thus:

> "The Board * * * earl[y] held that solicitation outside working hours but on company property was protected by § 7 and that a rule prohibiting it was

'discriminatory in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline.' *In re Peyton Packing Co.*, 49 N.L.R.B. 828, 843-844. We approved that ruling in *Republic Aviation Corp.* v. *NLRB*, 324 U. S. 793, 801-803." (*Id.* at 324.)

As the *Republic Aviation* Court explained, the Board had proceeded by developing a series of presumptions as to the validity of employer rules prohibiting union solicitation. In sustaining those presumptions, the Court quoted with approval the Board's formulation in the *Peyton Packing* case:

> "The Act, of course, does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time. Working time is for work. It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours. Such a rule must be presumed to be valid in the absence of evidence that it was adopted for a discriminatory purpose. It is no less true that time outside working hours, whether before or after work, or during luncheon or rest periods, is an employee's time to use as he wishes without unreasonable restraint, although the employee is on company property. It is therefore not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee outside of working hours, although on company property. Such a rule must be presumed to be an unreasonable impediment to self-organization and therefore discriminatory in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline." (49 NLRB at 843-844, quoted at 324 U.S. at 803-804, n.10)

And, as the Administrative Law Judge observed in this case:

> "Subsequent decisions have applied and refined the *Peyton Packing* rule, and the present Board policy may be summarized as follows:
>
> (1) A rule forbidding distribution of union literature by employees in working areas is presumptively valid even when applied to working and non-working time.
> (2) A rule forbidding distribution in non-working areas during non-working time is presumptively invalid.
> (3) A rule forbidding union solicitation by employees during their non-working time, even though limited to working areas, is presumptively invalid.
> (4) A rule forbidding union solicitation during working time in any plant area is presumptively valid.
> (5) A presumption of validity may be overcome if it can be shown that the rule is discriminatory rather than attributable to the right of the employer to protect his legitimate property interests." (223 NLRB at 1197)

As the Board and the Court of Appeals held, petitioner's rule is presumptively invalid under paragraphs 2 and 3 above, and petitioner failed to prove "special circumstances" that validate its rule. As we now show, petitioner's contentions (1) that these principles, though generally sound, may not be applied to hospitals (Pet. Br. 19-23) and (2) that petitioner did meet its burden of proof (*id.* 23-25), are without merit. We show further (3) that even if the burden of proving illegality was with the General Counsel, he met that burden by showing that the rule discriminated against union solicitation on its face and as applied.

B. *These General Principles Are Applicable to Hospitals and Require Invalidation of Petitioner's Rule.*

(1) Petitioner argues that because the Board has recognized the existence of special circumstances overcoming the presumption of invalidity in "strictly patient care" areas of the hospital,[10] the Board was required to reach the same

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[10] *St. John's Hospital and School of Nursing, Inc.*, 222 NLRB 1150, enforcement denied, 557 F.2d 1368 (C.A. 10).

conclusion with respect to all "areas where patients and visitors have access" (Pet. Br. 19).

But the Board's acceptance of the proposition that there are special circumstances in "strictly patient care" areas does not require it to reach the same conclusion without further evidence as to other areas of the hospital such as the cafeteria. *Republic Aviation* itself teaches that the Board has wide latitude to establish "the requirements of proof" which it "consider[s] appropriate to outweigh or overcome the presumption as to rules against solicitation [and distribution]," (324 U.S. at 803; see also *id.* at 798-800.) The distinction drawn by the Board, far from being arbitrary as petitioner charges, is entirely reasonable. It is intuitively obvious that a high measure of quiet and employee concentration are required in patient care areas. In contrast, it is just as plain that in other areas of a hospital the natural disorder of passageways and the relaxed atmosphere of gathering places prevails. The norm in such areas is the bustle of movement, the sounds of conversation, radio and television and the sight of people reading or exchanging reading material. All this the Board was plainly entitled, if not indeed, required, to take into account in determining whether the burden of demonstrating a need to restrict employee communication on union organization should be on the employer.[11] As the Court of Appeals for

[11] In considering whether the Board properly placed upon the hospitals the burden of establishing special circumstances which justify curtailing employees normal § 7 rights, petitioner's insistence that it possesses "the medical expertise required to determine what rules are necessary to preserve the medical well-being of persons under its care" (Pet. Br. 18) is self-defeating: For, "• • • the ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary. *United States* v. *New York, N.H. & H.R., Co.*, 355 U.S. 253, 256, note 5." (*Campbell* v. *United States*, 365 U.S. 85, 96.) See also *NLRB* v. *Great Dane Trailers*, 388 U.S.

the Seventh Circuit explained in *Lutheran Hospital of Milwaukee* v. *National Labor Relations Board*, 564 F.2d 208, 215 (footnote omitted):

> "Moreover, the Board's recognition that solicitation or distribution might be unsettling in immediate patient care areas does not undermine its holding that these activities would not be disturbing outside those locations. Solicitation or distribution might be undesirable in immediate patient care areas for two reasons. First, there is an obvious need in such areas for quiet • • • Second, these areas are the location where employees perform the function of patient care. • • •
>
> "But these factors are not present outside of immediate patient care areas. Patients and visitors do not require absolute quiet in cafeterias and lounges. And as we observed earlier, employees in those locations are not acting in their professional capacity, so that organizational activities cannot interfere with their job performance or with the provision of patient care. Thus, a typical patient or visitor would be indifferent to solicitation or distribution conducted outside of immediate patient care areas. This is true not because a patient is well enough to leave his room, but because the conduct of employees in locations such as cafeterias or lounges is irrelevant to the ordinary patient." [12]

26, 34: "• • • once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him."

[12] The Seventh Circuit disagreed with the Board's distinction between ambulatory and non-ambulatory patients; in all other respects it approved the Board's reasoning. While petitioner observes that the Seventh Circuit "enforc[ed] an order of the Board upon a factual record of differing from that developed in the case at hand" (Pet. Br. 22), it does not describe what differences there are other than the names of the parties. Indeed, the very point petitioner argues is that it is not called upon to make a factual record showing special circumstances. See also pp. 2-3, *supra*.

(2) Petitioner argues that the ruling here that the hospital's restriction on union activity in the cafeteria is presumptively invalid is inconsistent with the line of cases [13] holding that the prohibition of solicitation and distribution in "selling" areas of stores, restaurants and other retail establishments is presumptively valid (Pet. Br. 30-31). But contrary to that contention, the only similarity between this case and those involving restaurants is that they all concern eating places. And the Board has uniformly and correctly recognized that not all eating places are the same.

As the *Peyton Packing* case stated: "time outside working hours • • • during luncheon or rest periods is an employee's time to use as he wishes without unreasonable restraint • • • [it] is therefore not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee" during those periods. (49 NLRB at 843-44.) Thus, rules prohibiting union solicitation or distribution in employee lunch rooms and cafeterias have always been understood to be the type of ban on union activity in *non-working* areas that is presumptively invalid. "We find, as did the Trial Examiner, that • • • the application of the Respondent's no-solicitation rule to lunch periods when employees may properly be away from their places of work is in itself unlawful". (*I. F. Sales Co.*, 82 NLRB 137, 138, enforced 188 F.2d 931 (C.A. 6); *Monarch Machine Tool Co.*, 102 NLRB 1242, 1250-1251, enforced 210 F.2d 183, 186-187 (C.A. 6) cert. denied, 347 U.S. 967.) On the other hand, on the ground that "selling" areas including those of a restaurant, are *working* areas open to third persons, the Board, as already noted, has treated broad no solicitation/no distribution rules as presumptively valid.

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[13] See, *e.g.*, *May Department Stores Co.*, 59 NLRB 967, enforced as modified, 154 F.2d 533 (C.A. 8), cert. denied, 329 U.S. 725, and *Goldblatt Bros., Inc.*, 77 NLRB 1262.

In drawing the distinction between these different types of eating places the Board has been engaged in the "work of applying the Act's general prohibitory language in the light of the infinite combination of events that might be charged as violative of its terms • • • left to the [Agency by the Act]" (*Republic Aviation*, 324 U.S. at 798.) This would be the end of the matter if all eating places were open only to employees or only to the general public. But as this case shows, they are not. Thus, where an employer provides an eating facility open to his employees and to others, the Board must decide which presumption is more reasonable. Here, the Board concluded that the *Sales-Monarch* approach rather than that of *May-Goldblatt* should be followed. On the facts presented, that determination cannot be faulted. For the record demonstrates that the primary function of the facility was to serve the hospital's staff and not its patients and guests. Eighty-nine percent of the customers were staff. Consistent with that function the cafeteria was recognized by the hospital and its employees as a proper place for the exchange of information on a wide variety of subjects. (See pp. 2-6 *supra*.) In these circumstances it was plainly proper for the Board to place the burden of justifying a restriction on union solicitation and distribution on the hospital.

(3) There is a separate and independent ground for sustaining the Board's order even if the cafeteria were characterized as a "working area", or if the presumption of the no distribution/no solicitation rule's invalidity is deemed to be unjustified for some other reason. Even where a rule is presumptively *valid*, that presumption can be rebutted. And, as the ALJ correctly stated, under Board policy: "(5) A presumption of validity may be overcome if it can be shown that the rule is discriminatory rather than attributable to the right of the employer to protect his legitimate property interests." (223 NLRB at 1197.)

This principle, which was already articulated in *Peyton*

Packing, see p. 9, *supra,* has been frequently reaffirmed[14] and is not disputed by petitioner. But Petitioner contends that its "No-Solicitation, No-Distribution Rule Was Not Discriminatorily Applied", (Pet. Br. 35, heading). We submit that the contention need not be considered.

The Administrative Law Judge found "that the [employer] utilizes the cafeteria area for communication with employees" (223 NLRB at 1198), a finding buttressed by considerable detail (*Id.* at 1196). The Board adopted the finding, which was in turn approved by the Court of Appeals: "The Board's conclusion that the hospital had not carried its burden of showing special circumstances receives further support from the ALJ's supported finding that numerous non-union distribution activities have been routinely permitted in the cafeteria and coffee shop." (544 F.2d at 481, n.3). Thus, what was said in *Golden State Bottling Co.* v. *NLRB,* 414 U.S. 168, 174, is equally in point here:

> "On this state of the record, there is no justification for this Court's intervention, since *Universal Camera* precludes us from substituting our judgment for that of the Court of Appeals. This is not the place . . . to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other . . . ." *NLRB* v. *Pittsburgh S. S. Co.,* 340 U.S. 498, 503 (1951); see *Central Hardware Co.* v. *NLRB* 407 U.S. 539, 548 (1972)."

But assuming that the discrimination determination can be challenged at this point, it is clear that the Board's conclusion is entitled to stand. Petitioner does not controvert the evidentiary findings below. Rather, it contends that "[i]t is the controversial, as opposed to noncontroversial, nature of the conversation or printed matter" that distinguishes communications regarding union matters from

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[14] See, *e.g.*, the cases cited by the Court of Appeals, 544 F.2d at 481, n.3.

the communications which petitioner permitted. (Pet. Br. 15.) That contention (a) distorts what was found concerning petitioner's actual practice and (b) is fundamentally unsound in principle.

(a) The findings belie the contention that only what petitioner refers to as "innocuous type of solicitation (blood drives, car pool lists, baby gifts, etc.) [was] permitted in the cafeteria". (*Id.*; see 223 NLRB at 1196 quoted at pp. 4-5, *supra.*)

(b) In any event, there is no warrant in experience for treating the communication with respect to union matters as being inherently more controversial and more likely to create anxiety among patients than any of countless other public issues.[15] Such subjects are, of course, freely discussed in petitioner's cafeteria and in the newspapers which patients and their visitors find there, as well as in the radio and television programs available to patients and their visitors in lounges throughout the hospital. As the Seventh Circuit said in *Lutheran Hospital:* "We cannot believe that patients and their visitors who are present in these areas [cafeterias and lounges] are likely to become 'un-

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[15] Nor can it be rightly said that the solicitation of money on behalf of charitable organizations is invariably non-controversial. Depending on their views on the abortion issue, patients and visitors would have strongly conflicting views as to the desirability of contributing money to Catholic charities, or Planned Parenthood, and there are doubtless those among the general public served by Beth Israel Hospital to whom the United Jewish Appeal is anathema. Even the United Givers Fund, or similar combined charitable appeals, are controversial with many because of the uses which they make or do not make of contributions, or because of their competition with drives such as that of the Black United Fund. For example, a recent newspaper headline declared: "United Way Accused of Monopoly In Fight Over Charitable Funds" (*New York Times,* Monday, April 3, 1978, p. 1, columns 2-3).

settled' upon exposure to organizational activities conducted by employees. Labor unions are common entities in this country, and only an extraordinary patient would be so dismayed at witnessing an attempt to form one that his health would actually become impaired." (564 F.2d at 215.) Petitioner also omits mention of its own newsletter which is distributed to employees at their work stations and sometimes discusses the same unionization issue concerning which the employees are forbidden to distribute material in the cafeteria, and of the newsletter that it distributes *to patients* which includes material which is certainly far from "innocuous", such as an article about the rising incidence of rape. (See p. 6, *supra*.)

And, we submit that it is independently decisive instead that although "actual patients of Beth Israel have expressed the feeling that it is upsetting to overhear discussions of patient care matters by doctors (Pet. Br. 28) the hospital has promulgated *no rules* prohibiting or circumscribing such conversations; instead that fact is relied on as purported justification for barring entirely different communications by employees. Petitioner's failure to implement this "medical decision", with which all would intuitively agree, and which does not adversely affect employee § 7 rights, casts the gravest doubt on the *bona fides* of its claim that its rule was motivated purely by a desire "to protect its patients from the potentially harmful effects of such controversial [union] matters". (Pet. Br. 35.)

The short of the matter is that petitioner's rule violates the Act because it places greater restraints on union communications than on others thereby reversing the priorities which Congress has established in furtherance of the policy of the United States "to protect 'the exercise • • • of workers' full freedom of association.' " (*Magnavox, supra*, 415 U.S. 326, quoting § 1 of the NLRA). Discussion of that subject by employees, not least in the form of "solici-

tation" of union membership,[16] and the distribution of literature discussing union affairs among employees is affirmatively protected by §§ 7 and 8 of the Act against employer interference, the charitable or other solicitations described at Pet. Br. 35, be they ever so desirable, have not been granted the same Congressional protection.[17] Nor did Congress subject the enjoyment of these employee rights to the judgment of employers. Thus, petitioner is fundamentally in error when it contends "that the unique nature of a hospital places it outside the scope of the traditional area of NLRB labor relations expertise". (Pet. Br. 13.) The ultimate issue in this case is whether the statutory rights of the employees to communicate with each other concerning self-organization is to be overriden by other interests. The resolution of that issue, the striking of that balance, is a responsibility which Congress did not commit to hospitals, or to any other employers, but to an agency of its own creation—the National Labor Relations Board.

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[16] Petitioner's effort to forbid union solicitation when it does not forbid discussion generally brings to mind this Court's recognition in *Thomas* v. *Collins*, 323 U.S. 516, 535, that a sharp line cannot be drawn "between discussion, laudation, [and] general advocacy [of unionism] and solicitation [of union membership]." That being so, the Hospital's rule would have been discriminatory even if all fund raising had been forbidden, because it barred conversations urging union membership while permitting conversations on all other subjects.

[17] To the extent that the cases cited at Pet. Br. 36 makes special allowances for charitable and similar solicitations they are inconsistent with other Board decisions. (See, *e.g.*, *William L. Bonnell Co.*, 164 NLRB 110, 112; *Summit Nursing Home, Inc.*, 196 NLRB 769, 770, enforcement denied, 472 F.2d 1380 (C.A. 6).) Moreover, insofar as the Board cases support petitioner's distinction they defeat the "central purpose of [§§ 8(a)1 & 3] to protect employee self-organization • • • from disruptive interferences by employers" (*American Ship Bldg.* v. *Labor Board*, 380 U.S. 300, 317) and are therefore wrong as a matter of law, (see *id.* at 316-318).

As we show in Part II of this brief, Congress did not, when it subjected petitioner and other non-proprietary hospitals to the Act for the first time, diminish the Board's authority to forbide employer rules which interfere with employee § 7 rights. For that reason, petitioner's criticism of the court below for allegedly showing excessive deference to the Board's view—a decision to which petitioner prefers another court's almost summary reversal of the Board [18]—is wholly misguided. (See, e.g., *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375, 378 and cases cited *id.*; *NLRB* v. *Pipefitters*, 429 U.S. 507, 528, 531-532; *NLRB* v. *Iron Workers, Local 103*, 46 U.S.L.W. 4081, 4085.)

II. The 1974 Amendments and Their Legislative History Establish That the Board Was Not Required to Adopt Special Policies Limiting the Rights of Hospital Employees to Communicate With Respect to Union Organization.

In support of its proposition that the mere fact that organizational activity takes place in a *hospital* is in itself sufficient to displace the usual presumptions regarding solicitation/distribution, rules, and the necessarily concomitant assertion that the Board's determination to the contrary is not entitled to its usual weight because of an absence of medical expertise in the Agency, petitioner relies in part upon the 1974 Health Care Amendments and their legislative history. That history, it is said, shows that Congress intended the Board to "develop rules especially tailored to govern employee organization in the unique setting of a hospital." (Pet. Br. 13.) In fact, that law and its history conclusively demonstrate the opposite—that Congress intended to apply the same basic substantive rules of law developed over years of experience in labor relations generally to employees of nonprofit hospitals, except for *par-*

[18] *NLRB* v. *Summit Valley Nursing and Convalescent Home*, 472 F.2d 1380 C.A. 6).

ticular special rules contained in the 1974 Amendments, and certain detailed instructions to the Board contained in a Committee Report. Otherwise the Board was expected to fulfill its well-established role as the expert agency charged with primary authority to apply the Act.

Further, while those special rules did attempt to lessen the danger of actual disruption of services to patients by providing for notice prior to strikes or picketing and for a greater emphasis on mediation in the resolution of contract disputes than that contained in the NLRA generally, (see §§ 1(c)-1(e) of the 1974 Amendment, amending § 8(d) and adding § 8(g) to the NLRA, and § 213 to the LMRA (29 U.S.C. § 158(d) and (g); 29 U.S.C. § 183), Congress affirmatively refused to outlaw strikes or picketing altogether. Thus, Congress not only was willing to suffer, in the interest of employee rights, an immeasurably greater potential impact upon patients than solicitation of union membership and distribution of union literature in a few limited areas can possibly cause, but also demonstrated a complete lack of concern regarding any impact upon patients and visitors resulting from mere *knowledge* of the existence of a labor dispute.

A. First, the principal purpose of the 1974 Amendments was, of course, to *remove* the special exemption for nonprofit hospitals contained in the Taft-Hartley Act. S. Rep. No. 93-766, 93d Cong., 2d Sess., at 3 (hereafter "S. Rep."); H.R. Rep. No. 93-1051, 93d Cong., 2d Sess., at 4 (hereafter "H.P. Rep."). Thus, the Act "restore[d] to the employees of non-profit hospitals the *same* rights and protections enjoyed by the employees of proprietary hospitals and most all other employees [because] the public interest demands that employees of health care institutions be accorded the same type of treatment under the law as other employees in our society * * *". (H. Rep., at 4; see also S. Rep., at 3, 4.)

Over and over again the legislative history of the 1974

Act demonstrates the underlying premise of that Act to be that hospitals are *not* special in any way which justifies depriving their employees of the basic rights enjoyed by other employees under the NLRA. It was pointed out repeatedly that employees of hospitals are in at least as much need of aid from unions as other employees.[19] Thus, the basic principle of the 1974 Act was that stated by Senator Williams:

> "[N]ow that private hospitals have become a major industry, they should be treated the same as other industries in their business and labor relations, subject to the same regulations, obligations, and rights * * *. [E]mployees of nonprofit hospitals will no longer have

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[19] "During the last 2½ years, hospital wage increases have lagged far behind those received by workers in other industries * * * The long hours worked and the small reward received by hospital workers result in a constant turnover with a consequent threat to the maintenance of an adequate standard of medical care." (Leg. Hist., at 93 (remarks of Sen. Cranston).)

"[T]he medical industry * * * is the largest industry by far in the United States. The lowest people on the scale are those who swab the floors, who carry the bedpans, who are the nonprofessionals. It is to prevent their exploitation * * * that this legislation is needed." (Leg. Hist. 289 (remarks of Rep. Thompson).)

"Many hospital workers have been exploited through the years. Many women and blacks are employed in hospitals at despicably low wages * * * It is important that those workers in non-profit hospitals be given the opportunity to choose a union to represent them." (Leg. Hist., at 306 (remarks of Rep. Burke).)

"S. 3202 simply grants to nonprofit hospital workers the rights of union organization which other workers have long enjoyed, because they are low paid, with wages often below bare subsistence levels, these workers are in great need of the right to join unions and to bargain collectively * * * There can be no justification for discrimination against those men and women or for maintaining a double standard * * *" (Leg. Hist., at 405 (remarks of Rep. Badillo).)

> to maintain their status as second-class citizens in this area of labor relations." (Leg. Hist., at 95, 359.)

This declaration of equality applied both to substantive rules of law and to the role of the NLRB in developing and enforcing that law. This is evident, of course, from the simple fact that, rather than creating a special enforcement procedure, or a specialized agency to deal with labor relations in hospitals, Congress in this respect simply eliminated an exception and thereby committed hospital labor relations to the general procedures of the NLRA. But this point was also affirmatively stated. In response to a claim that the Act should not preempt specialized state medical labor relations agencies, because "they have people who have had experience", it was noted that the NLRB has "had the experience with the health care * * * profit hospitals * * * [T]hey do have the experience, and there will not be the situation which the gentlemen fears." (Leg. Hist. 319 (remarks of Rep. Thompson)).

B. Congress, of course "recognized the need to avoid disruption of patient care wherever possible." (S. Rep., at 6; H.R. Rep., at 8). But, Congress did not leave to the Board, or to the courts, the task of fashioning specialized rules toward this end. Rather, Congress itself delineated the particular areas in which "special consideration" (S. Rep. at 3; H.R. Rep., at 4) was needed—"notice requirements and other procedures related to potential strikes and picketing." (S. Rep., at 3, H.R. Rep., at 8.) And, Congress itself, over strong arguments that strikes and picketing either could not be tolerated at all in hospitals (see, e.g., S. Rep. at 39 (individual views of Sen. Dominick); Leg. Hist., 300, remarks of Rep. Henderson)) or should be prohibited for a sixty-day cooling off if there was a threat of substantial interference with the delivery of health care,[20] specified that

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[20] An amendment to this effect was passed by the House of Representatives, but was altered in Conference to provide for special dispute resolution provisions in such circumstances while permitting

even in this area where actual disruption of care could occur, only limited restraints on the exercise of employees' rights was to be tolerated. Thus, strikes and picketing were subjected only to a ten-day notice requirement, "to give health care institutions sufficient advance notice of a strike or picketing to permit them to make arrangements for the continuity of patient care". (S. Rep., at 4, H.R. Rep., at 5.) And, to facilitate settlements of contract disputes without strikes and to expedite the settlement of strikes once they begin, mediation was made mandatory, a longer period of time for notice of termination or modification of agreements was provided, and provision was made for a Board of Inquiry in certain instances to recommend settlement terms before the expiration of an agreement. (NLRA §§ 8(d), 8 (g); LMRA § 213.)

Indeed, the form of the limitations upon strikes and picketing demonstrates that Congress, while concerned to minimize the possibility of actual disruption of care by providing effective alternative dispute resolution mechanisms, was fully cognizant that some disruption *would* occur under the Amendments; the ten-day notice was designed to maximize the ability of hospitals to cope with that disruption, not to prevent it from occurring. And, obviously, a patient is much more likely to be harmed by a severe staff cutback, or by being transferred to another health care facility because of an inability of the hospital to provide care, or by being denied care altogether in non-acute situations for a time, than by mere knowledge of the potentiality of such problems or of a disagreement among employees concerning unionization. Nonetheless, while aware of such possibilities, Congress rejected the proposals to deny or drastically circumscribe the right to strike of hospital employees. Indeed, the *retention* of the right to strike and to picket is inconsistent with the notion that there is a patient

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the strike to continue. See Leg. Hist. 322-329, 349; § 213 of the LMRA, 29 U.S.C. § 183.

interest strong enough to override employees' rights in being shielded from any manifestation of union activity. For, obviously, a patient or visitor who approaches a hospital surrounded by pickets will be well aware that there is union activity. And, a patient who is either treated by a skeleton staff or turned away or transferred because of a strike will not only be aware of a labor dispute but will be directly, rather than hypothetically, affected by it.

The legislative history cited by petitioner confirms our understanding that Congress went so far, but no further, to provide special treatment to hospitals. The passage from the Senate Report quoted at Pet. Br. 10-11 is the beginning of a sentence which reads as follows: "In the Committee's deliberations on this measure, it was recognized that the needs of patients in health care institutions required special consideration in the Act *including a provision requiring hospitals to have sufficient notice of any strike or picketing to allow for appropriate arrangements to be made for the continuance of patient care in the event of a work stoppage.*" (S. Rep. 11, emphasis added to show the portion omitted in petitioner's brief.) And, the passage from the Senate Report quoted at Pet. Br. 11 with emphasis, and in one instance with double emphasis, is from a section of that Report entitled "Effect on Existing Law" (S. Rep. 12-14). The Report there sets out all the matters with respect to which the Committee believed that the Board should have special instructions on how to apply the Act and existing Board policies (such as those concerning the determination as to whether a person is a supervisor) to hospitals. The passage seized on by petitioner appears in a subsection entitled "Priority Case Handling"; and in the paragraphs after those quoted, the Committee notes that it has carefully considered the Board's priorities and provides: "some observations and directions to the Board" on that subject. That Congress so painstakingly delineated the matters as to which the Board was to accommodate the hospital's special function, compels the inference that the Board was other-

wise free to follow the "existing law". Additionally, it was observed in the legislative debates that the resulting balance was a "compromise" (Leg. Hist. 112 (remarks on Sen. Taft)), "a very carefully developed and finely tuned balance of competing considerations and philosophies that will, at the same time, protect labor and management rights and promote good health care." (Leg. Hist. 91 (remarks of Mr. Cranston)). Indeed it was expressly stated that

> "the National Labor Relations Board in administering the Act should understand specifically that [the] Committee understood the issues confronting it, and went as far as it decided to go and no further, and the Labor Board should use extreme caution not to read into this Act by implication—or general logical reasoning—something that is not contained in the bill, its report and the explanation thereof • • • [I]n this carefully tailored legislation Congress decided to treat the health care industry uniquely in certain respects. It decided to go so far, and no more. I trust this bill will be treated • • • in the same spirit." (Leg. Hist. 361, (remarks of Sen. Williams).)

Given the hospitals' litigation posture since the passage of the 1974 Amendments, it is particularly striking that although many representatives of hospitals and of hospital associations appeared before Congress to express concern about continuity of patient care in the event of a strike, and the possible fragmentation of bargaining units, none so much as suggested that the mere knowledge of employee efforts to organize might adversely affect "the health and well-being" of patients. (Pet. Br. 35.) Nor were there any suggestions that the Act be further amended to alter the long-established *Peyton Packing* presumptions. Even if not impeached by previous silence, the hospitals' contention in this and other cases that allowing such communications would impair "the ability of the Hospital to provide complete medical care and has infringed upon the rights of innocent third parties" (Pet. Br. 7-8), is addressed to the wrong forum. Only Congress has power to grant a broad

legislative exemption for a class of cases, and once Congress has determined what special rules to accommodate the needs of patients there shall be, it is most emphatically *not* "left to this Court to formulate guidelines to govern the question of solicitation and distribution of union literature in a hospital and its environs so as to insure that the rights of those innocent third parties, hospital patients, are protected." (Pet Br. at 8.)

C. There is a suggestion in petitioner's brief that Congress had no need to provide any special rule regarding solicitation in hospitals because the rule for which the hospital contends had been established by the Board with respect to proprietary hospitals in *Guyan Valley Hospital, Inc.*, 198 NLRB 107. But petitioner misstates what the Board decided in *Guyan Valley*. The passage at 198 NLRB 111 which is quoted at Pet. Br. 15 is from the Administrative Law Judge's decision in that case, and his reasoning was *not* adopted by the Board, which said in *Guyan Valley:*

> "In adopting the Trial Examiner's finding that the no-solicitation rule herein is lawful, we note that, unlike the rule condemned in *Summit Nursing and Convalescent Home, Inc.*, 196 NLRB No. 110, Respondent's rule was adopted before, and therefore not in response to, the Union's campaign; and, further, that *the rule herein prohibits solicitation only in the hospital's working area.*' Chairman Miller dissented from the finding of a violation in *Summit, supra,* but in any event agrees that the no-solicitation rule in the present case was lawful. Member Fanning dissents from the majority's conclusion that Respondent's broad no-solicitation rule is a valid rule. In his opinion there is no substantial distinction between the rule announced by the Respondent in this case and that considered by the Board in *Summit Nursing, supra.*" (198 NLRB 107, n.2; emphasis added.)

Thus, *Guyan Valley* involved solicitation only in working areas, and the case did not involve a cafeteria utilized primarily by employees; indeed, that much appears even from the Administrative Law Judge's decision as quoted at Pet.

Br. 15. The pre-1974 Board case which did involve a hospital cafeteria was *Bellaire General Hospital (Monterey Life Systems)*, 203 NLRB 1105. The Board there upheld an ALJ's determination that a hospital violated § 8(a)(1) by a non-solicitation policy indistinguishable from that of the petitioner in this case because it made "no distinction with respect to location, whether in patients' rooms, at nurses' stations, in cafeteria, on parking lots, etc.; nor with respect to time, whether on lunchtime, break-time, or immediately before or after work" (*id.* at 1108); the ALJ supported his conclusion that the "limitations now imposed were violative" on the basis of a supervisor's "testimony that on March 27 he 'more specifically' told [the discrimininatee] that the employees were prohibited from soliciting or distributing literature at the timeclock or on the cafeteria line; they might do these things while seated at a table, but not to employees at another table * * *" (*id.* at 1109).

Petitioner "question(s) whether the Board is in fact entirely free to cast aside prior rulings and to adopt new policies," (Pet. Br. 16). If the answer to that question is that the Board's prior ruling with respect to solicitation in proprietary hospitals was frozen by the 1974 Amendments, petitioner must lose this case, given *Bellaire* and what was actually decided in *Guyan Valley*.[21] But though the legislative history shows that Congress was informed of those decisions,[22] we do not contend that they were ratified by the

[21] For the same reasons, the Court of Appeals for the District of Columbia Circuit erred in relying on *Guyan Valley*. (*Baylor Medical Center* v. *N.L.R.B.*, quoted at Pet. Br. 15.)

[22] Chairman Miller submitted to the Senate Committee on Labor and Public Welfare a "Listing of Complaint and Representation Cases Involving Proprietary Hospitals" *Guyan* and *Bellaire* were included in the list of complaint (unfair labor practice) cases; none of the other cases involved the validity of a no-solicitation or no-distribution rule. (Hearings before the Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, 93d Congress, 1st Sess., on S. 794, etc., at 696.)

enactment of the 1974 Amendments. It is entirely sufficient to sustain the Board's decision that Congress left the Board free to apply its normal policies respecting solicitation and distribution to hospitals. And this the 1974 Amendments and the Committee Reports *do* make clear, by providing hospitals with certain limited exceptions to the NLRA, and by expressly instructing the Board with respect to those matters with which Congress was sufficiently concerned to conscribe the agency's normal discretion.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

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FOR ARGUMENT

Supreme Court, U. S.
FILED
APR 3 1978
MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

October Term, 1977

No. 77-152

BETH ISRAEL HOSPITAL,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

AMICUS CURIAE BRIEF SUBMITTED ON BEHALF OF THE NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, RWDSU, AFL-CIO

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TABLE OF CONTENTS

	Page
Interest of the Amicus Curiae . . .	1
Argument:	
THE COURT BELOW CORRECTLY ENFORCED THE ORDER OF THE BOARD WHICH FOUND THAT THE HOSPITAL VIOLATED SECTION 8(a)(1) OF THE ACT BY PROMULGATING AND MAINTAINING A NO-SOLICITATION/NO-DISTRIBUTION RULE WHICH PROHIBITED EMPLOYEES FROM SOLICITING UNION SUPPORT DURING NON-WORKING TIME IN THE CAFETERIA AND COFFEE SHOP OF THE HOSPITAL	3
Conclusion	14
Appendix:	
Consent To Filing Amicus Curiae Brief	A-1

TABLE OF AUTHORITIES

Cases:

Beth Israel Hospital, 223 NLRB No. 188, 92 LRRM 1078 4

	Page
Lutheran Hospital of Milwaukee, Inc. v. NLRB, 564 F.2d 208, 214 (CA 7 1977)	12
May Department Stores Co., 59 NLRB 976, enf'd. 154 F.2d 533 (CA 8 1946)	11
McDonald's Corp., 205 NLRB 404 . .	11
NLRB v. Beth Israel Hospital, 554 F.2d 477 (CA 1 1977)	4
NLRB v. Magnavox Company, 415 U.S. 322	3
NLRB v. J. Weingarten, Inc. 420 U.S. 251, 266, 267	6
Republic Aviation Corp. v. NLRB, 324 U.S. 793	3
St. John's Hospital and School of Nursing, Inc., 222 NLRB No.182, 91 LRRM 1333	2,3,4,
St. John's Hospital and School of Nursing v. NLRB, 557 F.2d 1368 (CA 10 1977)	9
Stoddard-Quirk Mfg. Co., 138 NLRB 615	3

Statutes:

120 Cong. Rec. 12938 (May 2, 1974)	7

	Page
120 Cong.Rec. 12939 (May 2, 1974)	8
House Report No. 93-1051	9
S. Report No. 93-766, 93rd Cong. 2d Sess., p.3	9
120 Cong. Rec. 22574 (July 10, 1974)	10
120 Cong. Rec. 16900 (May 30, 1974)	10
120 Cong. Rec. 22578 (July 10, 1974)	10
120 Cong. Rec. 22579 (July 10, 1974)	10

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By consent of the Petitioner and the National Labor Relations Board (attached hereto), National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO (hereinafter referred to as the "National Union") files this brief as Amicus Curiae.

Interest of the Amicus Curiae

The National Union represents close to 100,000 health care employees in over 350 health care institutions. This case is of vital concern to the Union and the members it represents as the right of

employees in this industry to organize and to join and assist labor organizations will be directly affected by the outcome of this case.

The decision of this Court in this matter will, of course, have a profound impact on the rights of health care employees to solicit their fellow employees to join them in becoming members of Unions. If the position of the National Labor Relations Board (hereinafter referred to as the "Board") is not upheld, Unions and employees in the health care industry will be deprived of rights that, for many, were only recently secured from Congress when the latter passed the 1974 Amendments to the Labor-Management Relations Act (hereinafter the "Act") which provided for the first time, coverage under the Act for employees employed by non-profit hospitals.

The National Union filed an amicus brief with the Board in St. John's Hospital and School of Nursing, Inc., 222 NLRB No. 182, 91 LRRM 1333, the case in which the Board established its current policy concerning solicitation and distribution rules in the health care industry. In addition, one of the Locals of the National Union was the charging party before the Board in another case involving the right of health care employees to solicit and distribute Union literature. The Board's order in the latter case was enforced in pertinent part in Lutheran Hospital of Milwaukee, Inc. v. NLRB, 564 F.2d 208 (CA 7 1977).

ARGUMENT

THE COURT BELOW CORRECTLY ENFORCED THE ORDER OF THE BOARD WHICH FOUND THAT THE HOSPITAL VIOLATED SECTION 8(a)(1) OF THE ACT BY PROMULGATING AND MAINTAINING A NO-SOLICITATION/NO-DISTRIBUTION RULE WHICH PROHIBITED EMPLOYEES FROM SOLICITING UNION SUPPORT DURING NON-WORKING TIME IN THE CAFETERIA AND COFFEE SHOP OF THE HOSPITAL

The Board, with court approval, has long held that an Employer may not lawfully adopt a rule prohibiting employee solicitation of Union membership during non-working time or prevent distribution of Union literature during non-working time in non-working areas, absent special circumstances. Republic Aviation Corp. v. NLRB, 324 U.S. 793; NLRB v. Magnavox Company, 415 U.S. 322; Stoddard-Quirk Mfg. Co., 138 NLRB 615.

Hospitals contended however that because of their unique status in providing services to the ill and infirm, the Board should adopt a special rule applicable to such institutions which would permit them to prohibit solicitation and distribution by employees on their non-work time in all areas to which the public and patients have access. The Board, in St. John's Hospital and School of Nursing, Inc., supra, held that since "the primary function of a hospital is patient care," a "tranquil

atmosphere is essential to the carrying out of that function." Sl.Op. p.3, 91 LRRM at 1334. The Board concluded that a hospital may lawfully ban all employee solicitation, even during non-working time, in "strictly patient care areas" such as patient rooms, operating rooms and X-ray and therapy facilities.

However the Board rejected as too broad the position of the hospitals that all solicitation and distribution of Union literature be banned in all areas to which patients and visitors have access including cafeterias, lounges and the like. The Board held, on balance, that "the interests of patients well enough to frequent such areas do not outweigh those of the employees to discuss or solicit Union representation." Sl.Op. p. 4, 91 LRRM at 1334.

In the instant case, the Board, relying on its decision in the St. John's case, found that Beth Israel Hospital (hereinafter referred to as the "Hospital") violated Section 8(a)(1) of the Act by maintaining an overly broad no-solicitation/no-distribution rule that prohibited all solicitation and distribution in all areas to which patients and visitors had access. Beth Israel Hospital, 223 NLRB No. 188, 92 LRRM 1078. The First Circuit enforced the Board's order insofar as it related to the cafeteria and coffee shop, the only areas of the Hospital the court believed were focused upon at the hearing before the Administrative Law Judge. NLRB v. Beth Israel Hospital, 554 F.2d 477 (CA 1 1977).

Thus the Board in the St. John's

case, supra, reached an accommodation between the competing rights and interests of the hospital employees and their employers. While the National Union would have preferred that the traditional rules of the Board with respect to solicitation and distribution of literature be applied equally to health care employees, the Board's decision reaching the accommodation was well within its discretion as:

> "[T]he Board has the 'special function of applying the general provisions of the Act to the complexities of industrial life,' NLRB v. Erie Resistor Corp., 373 U.S. 221, 236, 83 S.Ct. 1139, 1150, 10 L.Ed.2d 308 (1963); see Republic Aviation Corp. v. NLRB, 324 U.S. 793, 798, 65 S.Ct. 982, 985, 89 L.Ed. 1372 (1945); Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 196-197, 61 S.Ct. 845, 853-854, 85 L.Ed. 1271 (1941), and its special competence in this field is the justification for the deference accorded its determination. American Ship Building Co. v.NLRB, 380 U.S. at 316, 85 S.Ct., at 966. Reviewing courts are of course not 'to stand aside and rubber stamp' Board determinations that run contrary to the language or tenor of the Act, NLRB v. Brown, 380 U.S. 278, 291, 85 S.Ct. 980, 988, 13 L.Ed.2d 839 (1965). But the Board's construction here, while it may not be required by the Act, is at least permissible under it, and insofar as the Board's application of that

meaning engages in the 'difficult and delicate responsibility' of reconciling conflicting interests of labor and management, the balance struck by the Board is 'subject to limited judicial review." NLRB v. J. Weingarten, Inc., 420 U.S. 251, 266, 267.

The Hospital insists however, that the Board was required to uphold a ban on employee solicitation in all areas to which patients and visitors have access. The Hospital contends that Congress, when it extended the coverage of the Act to non-profit hospitals, clearly manifested its belief that the health care industry could not be treated in the same fashion as other industries, and that Congressional concern for uninterrupted patient care mandates rejection of the Board's order.

It is true of course that Congress recognized the special needs of health care institutions. Notice provisions dealing exclusively with such institutions were included in the Act to allow these institutions to prepare for labor disruptions. However the provisions added to the Act which deal exclusively with health care institutions do not relate to rules pertaining to solicitation or distribution. To the contrary, they pertain solely to the need of such institutions to maintain continuous service to patients.

Senator Williams, one of the sponsors of the legislation in the Senate which led to the 1974 Amendments to the Act noted as much when he stated:

"The prime concern of many witnesses who testified at our hearings on this bill was that hospitals be given protection against work interruptions that might cause injury or danger to patients.

Although we are convinced that the cause of the most prevalent and serious work disruption in hospitals - recognition strikes - will be eliminated simply by providing coverage of employees under the Taft-Hartley Act, we have added a number of provisions to the bill to accommodate the special need of the hospital industry to provide continuous quality service to patients." 120 Cong. Rec. 12938 (May 2, 1974, Remarks of Senator Williams).

Senator Javits, another sponsor of the legislation, commented on the special procedures which were added to the Act and which related solely to the health care industry:

". . . Of course, we all understand the critical community needs which health care institutions fulfill. The important question in this bill then is, what recognition should be given to the special situation involving the health - indeed the life and death of people? Some special procedures have to be mandated to avoid the disruptions of essential health care services

because of labor-management strife.

Mr. President, I should like to detail to the Senate three such provisions in the bill. First, the bill requires a 90-day rather than a 60-day notice of intention to reopen a contract upon its termination to be given to the Federal Mediation and Conciliation Service. In addition, at least 30 days notice must be given to the FMCS before any strike or lockout occurs in connection with the first contract.

The second item of safeguard is mandatory mediation by the Federal Mediation and Conciliation Service. In all other cases, it is voluntary; here it is mandatory. That makes a big difference, because it gets the U.S. Government into the picture immediately.

Third and last, 10 days notice of any strike or picketing, including stranger picketing, must be given to a health care institution. The committee report spells out in some detail the intention of the committee as to how this special provision should be interpreted and administered by the NLRB in order to guard against its abuse either by unions or employers." 120 Cong. Rec. 12939 (May 2, 1974, Remarks of Senator Javits).

None of these unique provisions even remotely deals with solicitation and distribution rules. Since Congress did not enact any limitations on employee solicitation rights in the health care industry, the Board was free to make the accommodation it reached in this case.

Moreover, the Hospital and those courts which agree with its position with respect to the legislative history of the 1974 Amendments, see e.g., St. John's Hospital and School of Nursing v. NLRB, 557 F.2d 1368 (CA 10 1977), completely ignore the fact that the major purpose of the amendments was to confer upon employees of non-profit health care institutions all of the rights guaranteed to other employees already covered by the Act. The House Report, No. 93-1051 stated with reference to the health care amendments:

> "The bill removes the existing Taft-Hartley exemption in section 2(2) of the Act. It restores to the employees of nonprofit hospitals the same rights and protections enjoyed by the employees of proprietary hospitals and most all other employees. Indeed, the Committee could find no reason why 1,427,012 employees of these nonprofit hospitals - representing 56% of all hospital employees - should continue to be excluded. H. Rept., No. 93-1051, 93rd Cong. 2d Sess., p.4.

See also S. Rept., No. 93-766, 93rd Cong. 2d Sess., p. 3.

When the Senate was considering the conference report, Senator Williams discussed the principal purpose of the amendments in the following language:

> "During the course of the recent debates the principal purpose of the bill - the extension of collective bargaining rights, was never the subject of serious challenge or controversy. Hopefully this unanimity will be interpreted to mean that employees of nonprofit hospitals will no longer have to maintain their status as second-class citizens in this area of labor relations." 120 Cong. Rec. 22574 (July 10, 1974, Remarks of Senator Williams).

See also, 120 Cong. Rec. 16900 (May 30, 1974, Remarks of Representative Ashbrook); 120 Cong. Rec. 22578 (July 10, 1974, Remarks of Senator Javits); 120 Cong. Rec.22579 (July 10, 1974, Remarks of Senator Taft).

Clearly then, Congress' intention was to treat health care employees in the same manner as all other employees except where special provisions were enacted to ensure against interruptions of patient care because of strikes or picketing. Congressional concern did not extend to solicitation and distribution rules.

The Hospital also contends that the Board erred in placing restrictions on hospitals that it does not place on retail stores and restaurants. In retail stores the Board has held that employers may prohibit solicitation on the selling floor

and in other public areas. May Department Stores Co., 59 NLRB 976, enf'd. 154 F.2d 533 (CA 8 1946). In restaurants the Board has permitted prohibitions on solicitation insofar as they apply to customer areas or areas within visual or auditory range of customers. McDonald's Corp., 205 NLRB 404. The reason for the modification of the Board's general rule pertaining to solicitation and distribution for retail stores was set forth in May Department Stores Co., supra, at p. 981:

> "We perceive no reasonable basis for distinguishing between the two types of enterprises so far as concerns a general prohibition against union solicitation by employees during non-working hours at all places on the respondent's premises. The respondent has adduced no convincing evidence that such blanket injunction bears reasonable relation to the efficient operation of its business. However, we do see reasonable ground for prohibiting union solicitation at all times on the selling floor. Even though both the solicitor and the person being solicited are on their lunch hour, for example, the solicitation, if carried on on the selling floor, where customers are normally present, might conceivably be disruptive of the respondent's business. We therefore find that the respondent's rule is invalid, and violative of the Act, only insofar as it prohibits union solicitation off the selling floor

during nonworking hours (such as luncheon and rest periods)."

The exception for retail stores and restaurants is applicable to commercial enterprises to ensure their survival. Manifestly the Board was not required to extend the exception to health care facilities. In Lutheran Hospital of Milwaukee, Inc. v. NLRB, 564 F.2d 208, 214 (CA 7 1977) the court cogently set forth the reasons why the Board's distinction between solicitation in retail stores and hospitals should be upheld:

> "In our judgment the distinction the Board has now drawn between hospitals and retail stores or restaurants is far from arbitrary. A retail store's or a restaurant's primary function is selling merchandise. The sales floor of a store and the public area of a restaurant are where either business carries out the sale of merchandise, and are also where the public deals with the employees in their professional capacity. Thus, insofar as union organizational activities create an abnormal atmosphere on the sales floor or in public areas, they interfere with the employees' job performance and disrupt the store's or restaurant's performance of its primary function.
>
> By contrast, the primary function of a hospital is to provide health care, and the areas of a

> hospital outside of immediate patient care areas are by definition not locations where the hospital's primary function is carried out or where the public deals with the employees in their professional capacity. Thus, while organizational activities conducted outside of immediate patient care areas might create an abnormal atmosphere where they took place, they would not interfere with the employees' job performance and therefore could not disrupt the hospital's performance of its primary function."

The Board, in light of the legislative history, and its experience in the health care industry, was correct in refusing to unduly restrict employee rights in the health care field. The Board properly accommodated the rights of employees, employers and patients and its decision as enforced by the court below should be upheld.

Conclusion

For the above stated reasons, the order of the court below enforcing the order of the Board should be affirmed.

Respectfully submitted,

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-152

BETH ISRAEL HOSPITAL,

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

CONSENT TO FILING AMICUS CURIAE BRIEF

We hereby consent, pursuant to Rule 42 of the Supreme Court Rules, to the filing in this proceeding with the Supreme Court of the United States of an amicus curiae brief on behalf of the National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO.

Wade H McCree, Jr.
Office of the Solicitor General on behalf of the National Labor Relations Board

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